(26,742)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 656.

LEO WEIDHORN, PETITIONER,

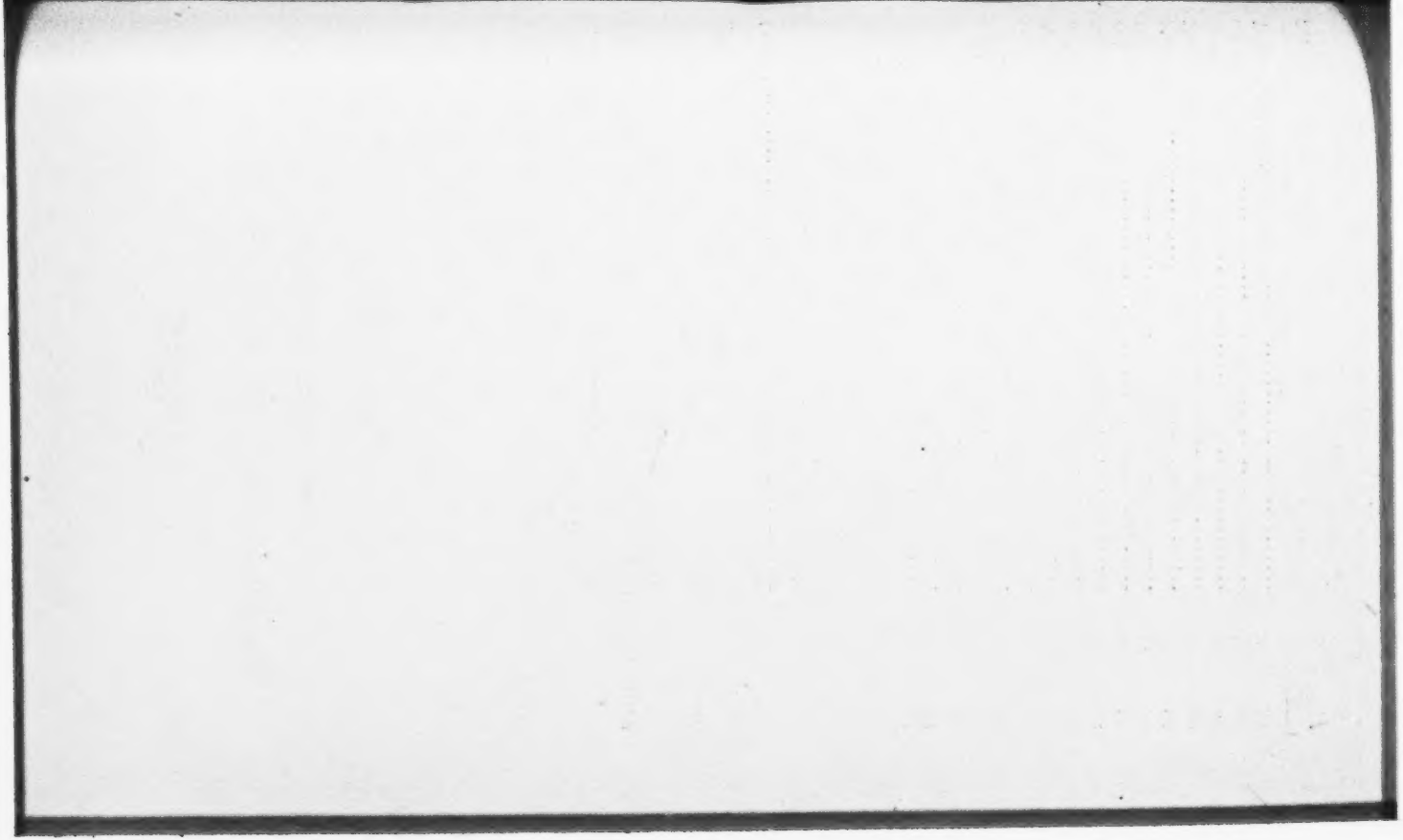
vs.

BENJAMIN A. LEVY, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF J. HERBERT WEIDHORN, BANKRUPT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 7, 1919.



6 United States Circuit Court of Appeals for the First Circuit, October Term, 1916.

No. 1302 (Original).

BENJAMIN A. LEVY, Trustee, Petitioner.

In the Matter of J. HERBERT WEIDHORN, Bankrupt.

Petition of Benjamin A. Levy, Trustee, to Revise in Matter of Law the Proceedings of the District Court.

RECORD.

Percy A. Atherton, Swift, Friedman, & Atherton, for Petitioner.
William M. Blatt, for Respondent.

Boston: Printed under direction of the clerk. 1917.

1 United States Circuit Court of Appeals for the First Circuit, October Term, 1916.

No. 1302 (Original).

BENJAMIN A. LEVY, Trustee, Petitioner.

In the Matter of J. HERBERT WEIDHORN, Bankrupt.

Petition of Benjamin A. Levy, Trustee, to Revise in Matter of Law the Proceedings of the District Court.

[Filed in Circuit Court of Appeals September 6, 1917.]

To the Honorable the Judges of the United States Circuit Court of Appeals for the First Circuit:

Respectfully represents Benjamin A. Levy, of Boston, in the District of Massachusetts, trustee of the estate of J. Herbert Weidhorn, in bankruptcy, No. 23,319, in proceedings pending in the United States District Court for the District of Massachusetts, against Leo Weidhorn, from whom relief is sought, the solicitor of record of said Leo Weidhorn in said proceedings in the District Court being William M. Blatt, Esquire:

First. That on March 17, 1916, your petitioner was at the first meeting of creditors of the bankrupt, J. Herbert Weidhorn, elected trustee in bankruptcy of said bankrupt and forthwith qualified as such.

Second. That on April 1, 1916, your petitioner filed with the ref-

eree in bankruptcy, to whom the bankruptcy case of J. Herbert Weidhorn had been referred by general reference, a bill of
2 complaint against one Leo Weidhorn, seeking to set aside two certain conveyances of property made by the bankrupt to his brother, Leo Weidhorn, on the ground that said conveyances were invalid because made in fraud of creditors under the Statute of Elizabeth and the Bankruptcy Act, Sec. 70e. A copy of said bill is hereto annexed marked "A." Upon the filing of this bill, the referee in bankruptcy issued a subpœna under the Equity Rules of the United States District Court for the First District, and also issued a temporary restraining order, as prayed for, restraining the transfer of the property pendente lite. A copy of the subpœna issued is annexed hereto marked "B," and a copy of the restraining order issued is hereto annexed marked "C." Thereupon the defendant, Leo Weidhorn, named in said bill, appeared on April 7, 1916, a copy of which appearance is hereto annexed marked "D," and filed, on April 24, 1917, with the referee an answer to the said bill of complaint, and subsequently, on April 25, 1917, filed a motion to dismiss the bill of complaint for want of jurisdiction. A copy of the answer is annexed hereto marked "E." A copy of the motion to dismiss is hereto annexed marked "F."

Third. The referee overruled the motion to dismiss, heard the parties and their counsel on the merits, and subsequently, on July 27, 1917, entered a decree declaring said conveyances void as against the creditors of the bankrupt, and as against your petitioner as trustee, and ordering said Leo Weidhorn to surrender the warehouse receipts and to execute to the trustee a bill of sale of said goods. A copy of said decree is annexed hereto marked "G."

Fourth. The said Leo Weidhorn, on August 1, 1917, petitioned to have said decree duly reviewed, a copy of which petition is hereto annexed marked "H," and thereupon the referee certified to the District Judge the questions raised by said petitioner for review, a copy of which certificate is hereto annexed marked "I."

Fifth. That arguments on said petition for review and referee's certificate were duly heard before the Honorable Judge of the District Court, and thereafter, on March 8, 1917, the Honorable Judge of the District Court filed an opinion in said cause, holding
3 that the referee had no jurisdiction. A copy of said opinion is hereto annexed marked "J," and on March 8, 1917, a decree was entered following said opinion, vacating the referee's decree and dismissing the bill, with costs, a copy of which decree is hereto annexed marked "K."

Sixth. Your petitioner says that in this proceeding there is manifest error in the following particulars, to wit:

(1.) The court erred in ruling that the respondent reasonably objected to the jurisdiction of the referee and afterwards filed an answer to the merits.

2.) The court erred in ruling that under the terms of a general reference to the administration of the estate to the referee, there was not included authority to hear and determine the issues raised by the bill of complaint herein referred to.

(3) The court erred in ruling that the referee has no jurisdiction.

(4) The court erred in not ruling that the referee had jurisdiction by consent of the parties.

(5) The court erred in not ruling that the referee had jurisdiction under the terms of a general reference of a bankruptcy case under General Orders XII. (1) to entertain and hear this suit brought by the trustee in bankruptcy to set aside property alleged to have been conveyed away by the bankrupt prior to his bankruptcy in fraud of creditors.

(6) The court erred in ruling that an order should be entered vacating the decree and dismissing the bill with costs as taxed in an equity suit in the District Court.

Wherefore, your petitioner prays:

(1.) That a decree be entered in this court in accordance with the rights of your petitioner in the foregoing matters.

(2.) That a decree be entered reversing or nullifying the order, and decree vacating the referee's decree and dismissing the bill, with costs, as taxed in an equity suit in the District Court.

(3.) That a decree be entered affirming the terms of the decree heretofore entered by the referee.

(4.) That your petitioner be granted his costs.

4 (5.) That your petitioner be granted such power and further relief as to this Honorable Court may seem proper.

BENJAMIN A. LEVY,
Trustee in Bankruptcy, Estate of J. Herbert Weidhorn,

By his attorneys,

SWIFT, FRIEDMAN & ATHERTON.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, William Nelson, clerk of the District Court of the United States, for the District of Massachusetts, hereby certify that the following are true copies of the

Bill of Complaint, filed April 1, 1916;

Subpœna, issued April 7, 1916;

Answer of Leo Weidhorn, defendant, to Bill of Complaint, filed April 24, 1916;

Motion to Dismiss Bill of Complaint, filed April 25, 1916;

Decree on Petition of B. A. Levy, Trustee, v. Leo Weidhorn et al., entered July 27, 1916;

Petition for Review, filed August 1, 1916;

Certificate by Referee to Judge on Petition of Benjamin A. Levy, Trustee, v. Levy Weidhorn and The Boston Storage Warehouse Company, filed October 2, 1916;

Opinion of the Court, handed down March 8, 1917, and

Order on Certified Question, entered March 8, 1917, in the cause entitled, No. 23,319, in Bankruptcy. In the Matter of J. Herbert Weidhorn, Bankrupt.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Boston, in said district, this fourteenth day of May, A. D. 1917.

[SEAL.] WILLIAM NELSON, *Clerk.*

5 A.

UNITED STATES OF AMERICA:

District Court of the United States for the District of Massachusetts.

No. 23319, in Bankruptcy.

In the Matter of J. HERBERT WEIDHORN, Bankrupt.

Benjamin A. Levy, of Boston, Massachusetts, as he is Trustee in Bankruptcy of Herbert Weidhorn, Plaintiff, now brings this Bill of Complaint against Leo Weidhorn, of said Boston, and The Boston Storage Warehouse Company, a corporation duly organized by law, and having a usual place of business in said Boston, Defendants.

To the Honorable James M. Olmstead, Referee in Bankruptcy in and for the county of Suffolk:

Respectfully represents Benjamin A. Levy, and says:—

That he is duly elected trustee in bankruptcy of J. Herbert Weidhorn, and that he has duly qualified and is now acting as such.

Upon information and belief the plaintiff alleges:—

1. That at all times hereinafter mentioned the said bankrupt was engaged in the business of selling at retail jewelry and kindred merchandise at two or more stores, principally in the city of Boston; and that while so engaged, on or before the third day of February, 1915, he was indebted to various persons in the regular course of business. That at said time he had a considerable stock of merchandise upon premises occupied by him at No. 671 Washington Street, in said Boston, which could be come at, and be attached, and applied by his said creditors in satisfaction of their respective claims.

6 2. That in the course of his said business the said bankrupt proposed to contract other indebtedness from time to time thereafter, which he was not certain he could discharge as and when the same matured in the rugular course of business; that thereupon, conceiving a scheme to hinder, delay and defraud his creditors, present and prospective, he entered into a conspiracy with the respondent, Leo Weidhorn, his brother, who was then, and still is, engaged in Boston in business as an insurance broker, whereby they proposed to cause a mortgage to be executed, conveying all of the property of the bankrupt, J. Herbert Weidhorn, for a purported consideration of $9091.14, for the purpose of preventing creditors of the said J. Herbert Weidhorn from reaching or applying to their claims any of the assets described in the said mortgage, and thereby hindering, delaying and defrauding creditors, present and prospective.

3. That thereupon, in pursuance of said conspiracy and scheme, on or about the third day of February, 1915, the bankrupt (hereinafter also referred to as the mortgagor), signed, sealed and delivered to the defendant, Leo Weidhorn (hereinafter referred to as the mortgagee), a mortgage bill of sale, purporting to secure a loan of $9091.14, and purporting to mortgage to the said mortgagee the following described goods and chattels, of which the mortgagor was then the apparent owner, to wit:—

"all my" (meaning the said bankrupt) "stock in trade of jewelry, watches, clocks, optical goods, diamonds, precious stones and the safe and cash register, and all tools, show cases, wall cases and fixtures located and situated in the store and show windows occupied by me" (said bankrupt) "at No. 671 Washington Street, in said Boston, meaning and intending hereby to convey and transfer any and all personal property belonging to me" (said bankrupt) "which is located in said store and show windows."

which said mortgage was duly recorded in the clerk's office of the city of Boston, book 1249, page 696.

4. That the said mortgagee did not pay the consideration set forth in said mortgage, or any consideration, but that the said conveyance was made with intent to hinder, delay and defraud present and prospective creditors of J. Herbert Weidhorn, and was not intended as a genuine mortgage, but wholly to promote the interests and to protect the property of said bankrupt.

5. That thereafter the said bankrupt continued in possession of said property, and purchased other and further merchandise which he intermingled with the merchandise described in said mortgage, and sold the said property without any regard to said mortgage, or without making any accounting to the mortgagee, and without paying any interest, and appropriating to his own uses and purposes the whole of the proceeds of said mortgaged property, together with the proceeds of the property after acquired and sold in connection with said mortgaged property.

6. That the goods and chattels in the mortgage first described were at the execution thereof in the mortgagor's place of business at No. 691 Washington Street, Boston. That soon after the execution thereof the said place of business was abandoned, and certain of the said goods and chattels were removed to another State, and formed the stock of a business there carried on by said mortgagee for a short period of time. That thereafter the said goods and chattels were returned to said Boston, and became part of the stock of said mortgagor's business at 256 Washington Street, in said Boston.

7. That thereafter, to wit, on the fifth day of October, 1915, when a good part, if not all, of the property mentioned in the original mortgage had been sold or otherwise disposed of, and other and further debts had been contracted, and the bankrupt was insolvent and unable to pay his existing debts, and also proposing and intending to contract other and further debts, the said bankrupt, in further pursuance of said fraudulent scheme or conspiracy, did, with intent to hinder, delay and defraud his present and prospective creditors,

then and there did execute and deliver to his said brother, the defendant, Leo Weidhorn, a further mortgage and bill of sale, also purporting to secure a loan of $9091.14, and conveying the following-described goods and chattels, which was then and there all of the property of the said bankrupt, to wit:—

8 "All my" (meaning the said bankrupt) "stock in trade of jewelry, watches, clocks, optical goods, diamonds and precious stones, and the safe and cash register, and all tools, show cases and wall cases and fixtures, located and situated in the store and show windows occupied by me at 256 Washington Street, in said Boston, meaning and intending hereby to convey and transfer any and all personal property belonging to me as located in said store or show window, together with all stock and property which shall from time to time be added to said stock in trade and all the property in my store at said 256 Washington Street.

8. That the said mortgagee did not pay the consideration set forth in said morgage, or any consideration, but that the said conveyance was made with intent to hinder, delay and defraud present and prospective creditors of J. Herbert Weidhorn, and was not intended as a genuine mortgage, but wholly to promote the interest and to protect the property of the said bankrupt.

9. That thereafter, from said fifth day of October, 1915, down to the twelfth day of February, 1916, the bankrupt continued in possession of said property, and purchased other and further merchandise, which he intermingled with the merchandise described in said mortgage, or without making an accounting to the mortgagee, and without paying any interest, and appropriated to his own use and purpose the whole of the proceeds of said mortgaged property.

10. That on or about the twelfth day of February, 1916, said mortgagee purported to make an entry for the purpose of foreclosing both of said mortgages, and with the consent and assistance of said mortgagor, and as part of the schemes or conspiracies herein alleged, took possession of all the goods and chattels then in the possession of said mortgagor at his place of business at said 256 Washington Street, and appointed said mortgagor as his, said mortgagee's, agent, to retain custody thereof and sell the same in course of business, and to continue the business.

11. That on or about the twenty-first of February, 1916, and at eight o'clock in the forenoon, the mortgagee purported to hold a foreclosure sale under the terms of one or both of said mortgages; that said sale was not sufficienfly or properly advertised, was

9 not attended by a sufficient number of bona fide prospective purchasers, and, in addition to an auctioneer, was attended by only the mortgagor, the mortgagee and their attorney, who was also their brother-in-law.

12. That said auctioneer purported to sell said goods and chattels under one or both of said mortgages to said mortgagee. That said mortgagee purported to purchase the property alleged to be covered by the first mortgage for the sum of $5005, paying therefor $5.00 in money and his promissory note for $5000; and that said mortgagee purported to purchase the property alleged to be covered by the

second mortgage for the sum of $1005, paying therefor $5.00 in money and his promissory note for $1000.

13. That thereafter said mortgagor continued to manage said business until on or about the twenty-fifth day of February, 1916, when he packed, or caused to be packed, the goods and chattels then forming the stock and fixtures of said business, caused the same to be transported by people employed by him to the place of business of the defendant, The Boston Storage Warehouse Company, and there to be stored in the name of said mortgagee.

14. That on the day immediately following, to wit, on the twenty-sixth day of said February, said mortgagor, in furtherance of said schemes or conspiracies to hinder, delay and defraud his creditors, filed a voluntary petition in bankruptcy in this court, which resulted in his adjudication and in the election of the plaintiff herein as said trustee.

15. That said goods and chattels are now in the possession of said warehouse, and stored in the name of said mortgagee; that on or about the twenty-second day of said March, the plaintiff, as trustee, and because of facts disclosed during his examination as trustee of said bankrupt, the mortgagor, notified said warehouse by mailing a letter, properly addressed and postage prepaid, to said warehouse; that as said trustee he claimed title to and possession of said goods and chattels.

16. That creditors of said bankrupt mortgagor have proved their claims; that they have not been paid; that the said bankrupt has assets of less than ten dollars other than the goods and chattels fraudulently conveyed as herein alleged; that the debts of said bankrupt, exclusive of debts to said mortgagee, if any, were by him scheduled as $10,134.06.

Wherefore, your plaintiff prays:—

1. That the mortgagee, Leo Weidhorn, and the warehouse-men, The Boston Storage Warehouse Company, be each made a party hereto, and summoned forthwith to appear and answer to the bill of complaint.

2. That the defendants, and each of them, and their servants, agents or employes, be forthwith severally enjoined, pending the determination of this proceeding, from removing and from permitting any person to remove from said warehouse any of the said goods and chattels in said warehouse contained.

3. That the defendant, Leo Weidhorn, and his agents and attorneys, be forthwith severally enjoined, pending the determination of these proceedings, from executing any instrument of transfer, or assigning or endorsing such instrument, with the purpose of changing title to or possession of said goods or chattels.

4. That the several mortgages or bills of sale by way of mortgage in this bill of complaint described be declared void as against the creditors of said bankrupt, at the execution thereof, and as against the plaintiff as trustee as aforesaid.

5. That the defendant, Leo Weidhorn, be ordered to account to the plaintiff, as trustee aforesaid, for said goods and chattels, and for the proceeds thereof, from the said twelfth day of February, 1916.

6. That the defendant, The Boston Storage Warehouse Company, and its agents, officers and employes, be severally forthwith enjoined, pending the determination of there proceedings, from removing and from permitting any person to remove from said warehouse any of the said goods and chattels in said warehouse contained.

7. That the defendant, Leo Weidhorn, be ordered forthwith to surrender to your plaintiff, as said trustee, the warehouse receipt, or receipts, issued to him by said warehouse for said goods and chattels, and to execute to your plaintiff, as said trustee, a bill of sale of said goods and chattels.

11 8. That the said Boston Storage Warehouse Company be ordered forthwith to deliver to your plaintiff, as said trustee, possession of said goods and chattels.

9. For such further and other relief as to this court seems meet and proper.

BENJAMIN A. LEVY,
Trustee as Aforesaid.

Boston, March 30, 1916.

Then personally appeared Benjamin A. Levy, trustee as aforesaid, and made oath that the foregoing bill of complaint by him subscribed is true to the best of his information and belief.

Before me,

SIDNEY DUNN,
Notary Public.

[Endorsed:] United States of America. District Court of the United States for the District of Massachusetts. In Bankruptcy, No. 23319. In the matter of J. Herbert Weidhorn, Bankrupt. Benjamin A. Levy, Trustee, v. Leo Weidhorn and The Boston Storage Warehouse Co. Bill of Complaint. Filed April 1, 1916, 3:15 p. m. Let respondents be made parties to these proceedings, subpœna to issue in accordance with Equity Rule 12 and respondents enjoined as prayed for. Olmstead, Referee. From the office of Swift, Friedman & Atherton, 30 State St., Boston.

12 B and C.

MASSACHUSETTS DISTRICT, *ss:*

[L. S.]

The President of the United States of America to Leo Weidhorn, of Boston, in our said District, Greeting:

For certain causes, offered before the District Court of the United States of America, within and for the Massachusetts District, as a court of bankruptcy, we command and strictly enjoin you, laying all other matters aside, and notwithstanding any excuse, that you personally appear before our said court, sitting in bankruptcy, at the office of the clerk of said court, in Boston, in said district, on or before the twentieth day after service of this subpœna, and then and

there file your answer or other defense to a bill of complaint exhibited against you in our said court, wherein the I. Charak Company is the petitioner, and you are the respondent, having been made party to these proceedings and are temporarily enjoined as prayed for in said petition; and to do further and receive that which our said District Court, sitting in bankruptcy, shall consider in this behalf. And this you are in nowise to omit under the pains and penalties of what may befall hereon.

And the marshal of said District of Massachusetts, or his deputy, is hereby commanded to make service of this subpœna and to return the same with his doings thereon into the office of the clerk of our said court on or about the twenty-eighth day of April, 1916.

Witness, the Honorable James M. Morton, Jr., at Boston, this seventh day of April A. D. 1916, in the one hundred and fortieth year of the Independence of the United States of America.

MARY E. PRENDERGAST,
Deputy Clerk.

[MEMORANDUM.—The respondent is required to file his answer or other defense in the referee's clerk's office, 121 P. O. Building, Boston, on or before the twentieth day after service, excluding the day thereof; otherwise the petition may be taken pro confesso.]

Due and sufficient service of this subpœna is hereby acknowledged this twenty-first day of April, 1916.

LEO WEIDHORN,
By His Attorney, A. W. HOE.

13 [Endorsed:] No. 23319. In Bankruptcy. I. Charak Co. v. Leo Weidhorn. Subpœna. Returnable April 28, 1916. Filed April 28, 1916, 9 a. m. Wm. Charak, Attorney, 27 School St., Boston.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, William Nelson, Clerk of the District Court of the United States for the District of Massachusetts, hereby certify that the following is a true copy of the appearance of William M. Blatt for Leo Weidhorn, filed April 7, 1916, in the clerk's office of said court, in the cause in bankruptcy, No. 23319, J. Herbert Weidhorn, Bankrupt.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Boston, in said district, this twenty-first day of May, A. D. 1917.

[SEAL.] WILLIAM NELSON, *Clerk.*

D.

I appear for Leo Weidhorn specially, denying jurisdiction.

WILLIAM M. BLATT,
43 *Tremont St., Boston.*

Filed April 7, 1916, 10 a. m.

14 E.

UNITED STATES OF AMERICA:

District Court of the United States for the District of Massachusetts.

No. 23319. In Bankruptcy.

In the Matter of J. HERBERT WEIDHORN, Bankrupt.

BENJAMIN A. LEVY

against

LEO WEIDHORN and THE BOSTON STORAGE WAREHOUSE COMPANY.

Answer of Leo Weidhorn, Defendant, to Bill of Complaint.

And now comes the defendant, Leo Weidhorn, in the above matter, and for answer says:

1. That as to the first paragraph he admits the allegations therein.

2. That as to the second paragraph he denies each and every statement therein, except that he is the brother of the bankrupt, and is in business as an insurance broker, and that a mortgage for nine thousand ninety-one and 14/100 (9091.14) dollars was executed by the bankrupt to the defendant, and more specifically he denies that the bankrupt and he entered into any scheme to hinder, delay or defraud the creditors of the bankrupt, and denies that the consideration for the mortgage was not genuine, and denied that the purpose of said mortgage was to prevent the creditors of the bankrupt from reaching or applying to the claims any of the assets described in the said mortgage, except in so far as such intention was involved in his, the defendant's, desire to protect his own valid claim.

3. That as to the third paragraph the defendant denies that the mortgage therein described was entered into in pursuance of any scheme or conspiracy to defraud, but as to the other allega-
15 tions in said paragraph the defendant admits the same.

4. That as to the fourth paragraph the defendant denies each and every allegation therein.

5. That as to the fifth paragraph the defendant says that such sales as the bankrupt made were permitted by the mortgagee and were made with his knowledge, and as to the rest of the paragraph the defendant is informed and believes that it is true.

6. That as to the sixth paragraph the defendant is informed and

believes that the statements therein contained are true, except that the mortgagee never carried on said business.

7. That as to the seventh paragraph the defendant says that at the time of the placing of the second mortgage he is informed and believes that a large part of the original stock was still in said store, and the defendant further denies that the placing of the second mortgage was in pursuance of any fraudulent scheme or conspiracy; and the defendant further denies that he knew, or had reason to know, that the bankrupt was insolvent and unable to pay the existing debts, or that he proposed and intended to contract other and future debts.

8. That as to the eighth paragraph the defendant denies each and every allegation therein.

9. That as to the ninth paragraph the defendant says that property purchased subsequently to the 5th of October, 1915, became part of the said mortgage by the terms thereof, and cannot, therefore, be said to be intermingled, and that the defendant was aware of all that was done with relation to said property; and as to the rest of said paragraph the defendant is informed and believes that it is true.

10. That as to the tenth paragraph the defendant denies that the foreclosure therein described was part of any fraudulent scheme or conspiracy.

11. That as to the eleventh paragraph the defendant denies that the sale therein described was not a sufficient or proper one, and as to the remainder of the paragraph the defendant says that there was a sale at the time and place mentioned under the terms of both mortgages, and that he has no present recollection of who attended the sale besides the mortgagee and one other person who was not acting as attorney for either the mortgagor or mortgagee.

12. That as to the twelfth paragraph the defendant admits that the statements therein are true.

13. That as to the thirteenth paragraph the defendant says that no business was done in said store between February 21, 1916, and February 25, 1916, except the packing of the goods and chattels then forming the stock and fixtures of said business, and that said time was consumed in said packing, and that as soon as the packing was finished the goods were stored as described, and that no sales were made after the foreclosure sale above described.

14. That as to the fourteenth paragraph the defendant denies that the petition in bankruptcy, filed in this court, was filed in furtherance of any fraudulent scheme or conspiracy.

15. That as to the fifteenth paragraph the defendant is informed and believes that the statements therein are true.

16. That as to the sixteenth paragraph the defendant is informed and believes that the statements therein contained are true.

LEO WEIDHORN.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Boston, April 17, 1916.

Then personally appeared Leo Weidhorn, and made oath that the statements above subscribed by him are true, except so far as they are made upon information and belief, and that as to the latter he is informed and believes that they are true.

Before me,

WILLIAM M. BLATT,
Notary Public.

[Endorsed:] No. 23319, In Bankr. Benjamin A. Levy v. Leo Weidhorn and Boston Storage Warehouse Co. Answer of
17 Leo Weidhorn, Deft., to Bill of Complaint. Filed April 24, 1916, 9:55 a. m. From the office of William M. Blatt, Counsellor at Law, 43 Tremont Street, Boston, Mass.

F.

UNITED STATES OF AMERICA:

District Court of the United States for the District of Massachusetts.

No. 23319, In Bankruptcy.

In the Matter of J. HERBERT WEIDHORN, Bankrupt.

BENJAMIN A. LEVY, of Boston, Massachusetts, as he is Trustee in Bankruptcy of J. Herbert Weidhorn, Plaintiff, against Leo Weidhorn, of said Boston, and The Boston Storage Warehouse Company, a corporation duly organized by law, and having an usual place of business in said Boston, Defendants.

Motion to Dismiss Bill of Complaint.

And now comes the defendant, Leo Weidhorn, in the above matter, and moves that the bill of complaint be dismissed on the ground that the referee had no jurisdiction to act thereon.

WM. M. BLATT,
Attorney for Defendant Weidhorn.

18 [Endorsed:] No. 23319. Benjamin A. Levy v. Leo Weidhorn and The Boston Storage Warehouse Co. Motion to Dismiss Bill of Complaint. Filed April 25, 1916, 9 a. m. From the office of William M. Blatt, Counsellor at Law, 43 Tremont Street, Boston, Mass.

G.

UNITED STATES OF AMERICA:

In the District Court of the United States for the District of Massachusetts.

No. 23319, In Bankruptcy.

In the Matter of J. HERBERT WEIDHORN, Bankrupt.

Decree.

This case came on to be heard, was argued by counsel, and upon consideration thereof, It is hereby ordered and decreed that the several mortgages, or bills of sale by way of mortgage, in the bill of complaint described be and they hereby are ordered declared void as against the creditors of said bankrupt at the execution thereof, and as against the plaintiff, as trustee aforesaid, in accordance with the fourth prayer of said bill; that the defendant, Leo Weidhorn, be, and he hereby is, ordered to account to the plaintiff, as trustee aforesaid, for said goods and chattels, and for the proceeds thereof, from the said twelfth day of February, 1916, in accordance with the fifth prayer of said bill; and that the defendant, Leo Weidhorn,
19 be, and he hereby is, ordered forthwith to surrender to said plaintiff, as trustee, the warehouse receipt, or receipts, issued to him by said warehouse, for said goods and chattels, and to execute to said plaintiff, as said trustee, a bill of sale of said goods and chattels, all in accordance with the seventh prayer of said bill.

Witness, my hand, at Boston, this twenty-seventh day of July, A. D. 1916.

JAMES L. OLMSTEAD,
Referee in Bankruptcy.

[Endorsed:] No. 23319. In Bankruptcy. Law of 1898. In the Matter of J. Herbert Weidhorn, Bankrupt. Decree on Petition of B. A. Levy, Trustee, v. Leo Weidhorn et al. July 27, 1916.

H.

In the District Court of the United States for the District of Massachusetts.

No. 23319, In Bankruptcy.

In the Matter of J. HERBERT WEIDHORN, Bankrupt.

Petition for Review.

To Honorable James M. Olmstead, Referee in Bankruptcy:

Your petitioner respectfully shows:

That your petitioner is the defendant in a petition in the nature of a bill in equity brought by the trustee of the bankrupt against

him, and that a decree and order were entered on the twenty-seventh day of July, 1916, a copy of which decree and order is hereto annexed.

20 That such order was, and is, erroneous in that there is no warrant in law for the said order upon the evidence in the case;

That the fraud alleged in the said bill of complaint has not been proven;

That no fraud has been proven on the part of your petitioner;

That said order and the finding upon which it is based are against the weight of the evidence.

Wherefore, your petitioner, feeling aggrieved because of such order, prays that the same may be reviewed, as provided in the Bankruptcy Law of 1898 and General Order XXVII.

Dated at Boston, the first day of August, 1916.

LEO WEIDHORN.

STATE OF MASSACHUSETTS,
County of Suffolk, City of Boston:

I, Leo Weidhorn, the petitioner mentioned and described in the foregoing petition, do hereby make solemn oath that the statements of fact therein contained are true, according to the best of my knowledge, information and belief.

LEO WEIDHORN.

Subscribed and sworn to before me this first day of August, 1916.

WILLIAM M. BLATT,
Notary Public.

UNITED STATES OF AMERICA:

In the District Court of the United States for the District of Massachusetts.

No. 23319, In Bankruptcy.

In the Matter of J. HERBERT WEIDHORN, Bankrupt.

Decree.

This cause came on to be heard, was argued by counsel, and upon consideration thereof, It is hereby ordered and decreed that

21 the several mortgages, or bills of sale by way of mortgage, in the bill of complaint described be and they hereby are ordered declared void as against the creditors of said bankrupt, at the execution thereof, and as against the plaintiff, as trustee aforesaid, in accordance with the fourth prayer of said bill;

That the defendant, Leo Weidhorn, be, and he hereby is, ordered to account to the plaintiff, as trustee aforesaid, for said goods and chattels, and for the proceeds thereof, from the said twelfth day of

February, 1916, in accordance with the fifth prayer of said bill; and

That the defendant, Leo Weidhorn, be, and he hereby is, ordered forthwith to surrender to said plaintiff, as trustee, the warehouse receipt, or receipts, issued to him by said warehouse, for said goods and chattels, and to execute to said plaintiff, as said trustee, a bill of sale of said goods and chattels, all in accordance with the seventh prayer of said bill.

Witness, my hand, at Boston, this twenty-seventh day of July, A. D. 1916.

——— ———.

[Endorsed:] No. 23319. J. Herbert Weidhorn. In Bankruptcy, No. 23319. Petition for Review. Filed Aug. 1st, 1916, 1.45 P. M. From the office of William M. Blatt, Counsellor at Law, 43 Tremont Street, Boston, Mass.

22 1.

In the District Court of the United State, District of Massachusetts.

No. 23319, In Bankruptcy.

In the Matter of J. Herbert Weidhorn, Bankrupt.

Certificate by Referee to Judge on Petition of Benjamin A. Levy, Trustee, v. Leo Weidhorn and the Boston Storage Warehouse Company.

I, James M. Olmstead, one of the referees of said court in bankruptcy, do hereby certifiy that in the course of the proceedings in said cause before me the following question arose pertinent to the said proceedings:—

This was a petition to review a decree entered in favor of the complainant in a bill brought by Benjamin A. Levy, as trustee of said estate, against Leo Weidhorn and the Boston Storage Warehouse Company. The purpose of the proceeding was to set aside, by virtue of the provisions of Section 70*e* of the Bankruptcy Act, certain mortgages given by the debtor to said respondent, Leo Weidhorn. Section 70*e* provides that: "The trustee may avoid any transfer by the bankrupt of his property which any creditor of said bankrupt might have avoided," etc.

The Massachusetts Statute, R. L., Chap. 159, Sec. 2, Clause 8, provides that certain courts have jurisdiction over "suits to reach and apply, in payment of a debt, any property, right, title or interest, real or personal, of a debtor, liable to be attached or taken on execution in an action at law against him, and fraudulently conveyed by him with intent to defeat, delay or defraud his creditors," etc.

Other applicable provisions of the Bankruptcy Act are secs. 3*a*; 67*d, e.*

The bill of complaint was filed on April 1, 1916, and a general answer thereto was filed by the defendant Weidhorn on April
23 24, 1916, followed on April 25, 1916, by a motion to dismiss for want of jurisdiction. The facts are so ably and truthfully presented in the brief the learned counsel for the complainant filed July 6, 1916, that I can add but little thereto by way of summary.

The debtor and respondent, Leo Weidhorn, are brothers. On January 1, 1915, the debtor was in the jewelry business, at No. 671 Washington Street, Boston. His brother Leo was in the insurance business, and in the year 1906 furnished the capital to his brother, J. Herbert Weidhorn, with which to start him in business in Malden. After having made a number of loans he obtained from the debtor a mortgage to secure him for his advances, which mortgage was subsequently discharged when all danger of financial trouble had disappeared, the debtor apparently prospering in business. During the month of February, 1915, the debtor's landlord began to press him for his rent, and on March 13, 1915, brought suit against him and trusteed the respondent Leo. In consequence of this trouble with the landlord, I find that the debtor was induced to give his brother Leo a mortgage, on February 3, for $9091.14, which was security for that amount of money due the respondent Leeo for loans which he had from time to time made.

It was in evidence that Leo managed the financial end of the business, while the debtor, J. Herbert, attended to its details. At all times Leo was familiar with his brother's business, even to the extent of keeping some of the books in his own handwriting. At the time this mortgage was given the debtor only owed $800 or $900, in addition to his indebtedness to the Washburn Realty Company, his landlord.

I find that the debtor's chief purpose was to protect his brother at all hazards, even though this and a subsequent mortgage might have the effect to hinder, delay and defraud creditors. On March 27, 1915, a fortnight after he had been sued, the debtor moved to Manchester, New Hampshire, where he carried on business. Subsequently the suit of March 13 ripened into judgment and execution, and negotiations were entered into by which the debtor, during his absence from Massachusetts, might be relieved from arrest. Early in October the debtor returned to Boston and resumed busi-
24 ness at No. 256 and No. 449 Washington Street. On October 5 the debtor executed a new mortgage for the same amount to his brother Leo, the only difference being that it contained an after property clause.

Certain evidence was presented by two disinterested witnesses, Max W. Alberts and David Menzer. Mr. Alberts, who was a creditor on February 3, 1915, for $615.40, testified that the debtor in February, after he had learned of the mortgage, came to his office and stated that he did not get any money from his brother, and that he had made the mortgage to secure himself against the landlord; and in answer to Mr. Alberts' remark that the debtor would have trouble with other creditors, said, "You are practically the only creditor I

have, as I owe only $800 or $900," and made no mention of any indebtedness to his brother. David Menzer, a jeweler, to whom the debtor owed $313.50 at the time of the October mortgage, testified to a conversation with the debtor in which he referred to trouble with his *landlord, and said* that the mortgage was a protective mortgage, and that he owed only about $800 or $900. Between October and the close of the Christmas holiday season, the debtor seems to have incurred large liabilities, his schedule showing, at the time of his failure on February 26, 1916, liabilities amounting to $10,134.06 and assets of $7.25. About the middle of January, 1916, suits were brought at the time when the debtor was ill, and keepers were put in his store.

On February 21 a foreclosure sale took place of the two mortgages. I find that this sale was a mere form gone through by the brothers, with the assistance of Mr. MacKusick, a brother-in-law of the debtor, the two brothers, the auctioneer and Mr. MacKusick being the only ones present, and the sale having been held at an unusually early hour in the morning. The goods were subsequently packed up by the debtor and removed to the respondent's storehouse. The respondent Leo gave the auctioneer a note for $5000 for the purchase of the goods covered by the first mortgage and a note of $1000 for the goods covered by the second mortgage. These goods were invoiced at a value of about $12,000, their real value probably
25 being between $7000 and $8000. I find the notice of the sale of the foreclosure was a few days after the 5th of February, when the four months' period would have expired. On the 26th day of February, five days after the foreclosure sale, the debtor filed his petition in bankruptcy. To aid him in so doing, his brother-in-law, Mr. MacKusick, took his oath to the schedules, and the brother Leo gave an attorney in Mr. MacKusick's office a check for $100 to pay the bankruptcy expenses.

Such, in brief, are the facts as I find them to be. Upon careful consideration of the testimony, I am led to conclude and find that the debtor intended to hinder, delay and defraud his present and future creditors; that the schedule showed a number of creditors who were such at the time of the February and October mortgages. I further find that the brother Leo, who was a very shrewd and intelligent business man, was fully conversant with the details of the debtor's business from the outset; that, in fact, the business was rather Leo's than J. Herbert's, and that the relation between them was rather that of principal and agent than of debtor and creditor. I find that the respondent Leo fully participated in the fraudulent intent of the debtor to hinder, delay and defraud his creditors.

Turning now to the law as applicable to the above facts, it is to be borne in mind that liens to be valid must be "given or accepted in good faith, and not in contemplation of or in fraud upon this act." Sec. 67*d*.

This bill is brought by virtue of the principles contained in the Statute of Elizabeth. The history of this statute is ably presented in "Creditors' Rights and Remedies," by Glenn, secs. 66-70.

In Klinger v. Hyman (C. C. A.), 223 Fed. 257, 263, the history of this famous act is fully presented. In this same case the court says: "It is the fraudulent intent which invalidates."

A valuable note on the Statute of Elizabeth, by Hon. James M. Kerr, is found in the case of Platt v. Schreyer, 25 Fed. 83, 92; s. c. Schreyer v. Scott, 134 U. S. 405.

In English v. Brown, 219 Fed. 248, 262, 264, is to — found an excellent review of authorities by Hunt, C. J.

26 A case similar to the instant one is Green v. Tantum, 19 N. J. Eq. 105; affirmed in 21 N. J. Eq. 364. This was a transfer by one brother to another for value, but with intent to defraud creditors where the vendee was affected by notice and put upon his inquiry.

Perhaps the leading case is that of Sexton v. Wheaton, 8 Wheaton, 229, cited in Adams v. Collier, 122 U. S. 382, 388. The latest Massachusetts case relied upon by the learned counsel for the complainant is Rolfe v. Clarke, 224 Mass.

In addition to the cases contained in the brief of learned counsel for the complainant, the following Massachusetts cases may be cited: Mowry v. Reed, 187 Mass. 174; Gately v. Kappler, 209 Mass. 426; Holbrook v. International Trust Co., 220 Mass. 150.

The learned counsel for the respondent contends that the referee sitting as a court of bankruptcy has no jurisdiction. At the hearing I ruled that if the proceeding was equitable and plenary, the referee had jurisdiction, and that the respondent having appeared in answer had admitted the jurisdiction. Since the amendments of 1903 and 1910 the jurisdiction of the bankruptcy court no longer depends upon the consent of a respondent.

In the case of O'Brien, 21 Am. B. R. 11, the jurisdiction of the referee was sustained by Judge Dodge. In re Jules v. Frederick Co., 27 Am. B. R. 136, and note; 34 Am. B. R. 5, and note; s. c. 193 Fed. 533, and 200 Fed. 747; in Studley v. Boylston National Bank, 30 Am. B. R. 161, and note; also 164; s. c. 229 U. S. 523, which was a case of recovery of a preference, the Supreme Court says: "The case was tried by the referee." And further on, "* * * but if, as found by the referee * * *" § 41*a* (4). Collier on Bankruptcy (10th Ed.), page 595, notes 40, 41.

And the said question, together with the pleadings, testimony, and briefs of the learned counsel, is certified to the judge for his opinion thereon.

Dated at Boston, this twenty-ninth day of September, A. D. 1916.

JAMES M. OLMSTEAD,
Referee in Bankruptcy.

27 [Endorsed:] No. 23319. In the Matter of J. Herbert Weidhorn, Bankrupt. Certificate by Referee to Judge on Petition for Review of Leo Weidhorn. United States District Court. Filed in Oct. 2, 1916, 3.50 p. m. Clerk's Office, Mass. Dist.

J.

The District Court of the United States for the District of Massachusetts.

No. 23319, in Bankruptcy.

In the Matter of J. HERBERT WEIDHORN, Bankrupt.

March 8, 1917.

MORTON, *J.*:

This case presents an important question as to the jurisdiction of the referee. From the certificate it appears that, more than four months before the institution of bankruptcy proceedings, the bankrupt had conveyed property to his brother, LEO Weidhorn. There is no question but what, at the time of the bankruptcy, this property was in the exclusive possession of the brother under an actual claim of ownership. The trustee in bankruptcy filed with the referee what is called a "bill of complaint" against LEO; it is in form and in substance a well-drawn bill in equity, alleging that the conveyances in question from the bankrupt to the respondent were invalid, because made in fraud of creditors, under the Statute of Elizabeth and the Bankruptcy Act, Sec. 70*a*. Upon the filing of this bill the
28 referee directed that a subpœna issue under the equity rules of this court, and also issued a temporary injunction, as prayed for, restraining the transfer of the property pendente lite. The subpœna was in the usual form of those used in this court, except that it directed the defendant to appear before said court "sitting in bankruptcy," and notified the defendant to file his answer "in the referee's clerk's office." It was signed by one of the deputy clerks of this court, and bore the teste and seal of the court. The bill was filed only with the referee, and no order was made in the proceedings except by him.

The respondent seasonably objected to the jurisdiction of the referee, and afterwards filed an answer to the merits. By so doing, he did not assent to the referee's jurisdiction.—Louisville Trust Co. v. Comingor, 184 U. S. 18, at 26. The referee proceeded to hear and determine the merits of the controversy, and entered a final decree against the respondent, declaring the several mortgages or bills of sale in question to be void, and ordering the surrender of the goods in question to the trustee, and an account. Both the jurisdictional question and the merits of the case are certified for review.

The proceedings are in no sense summary, nor are they so regarded either by the referee or by the parties. The referee's decision is, that a trustee in bankruptcy may proceed before a referee by plenary suit, unlimited as to amount, to recover property never in the possession of the Bankruptcy Court.

The duties of the referee do not begin until the case has been referred to him; and his jurisdiction, therefore, includes only such

parts of the bankruptcy jurisdiction of the District Court as are carried by the reference. The order of reference was made under General Order XII. (1), which provides as follows: "And thereafter all proceedings, except such as are required by the act or these General Orders to be before the judge, shall be had before the referee." If the referee has jurisdiction of the present suit, it must be because it is covered by the words, "all proceedings," in this order.

"Proceedings" has, in bankruptcy, a well-recognized, technical meaning. It has been defined under Section 24, as—

29 "covering questions between the alleged bankrupt and his creditors, as such, commencing with the petition for adjudication, ending with the discharge, and including matters of administration generally, such as appointment of receivers and trustees, sales, exemptions, allowances and the like, to be disposed of summarily, all of which naturally occur in the settlement of the estate";

Baker, J., in re Friend, 134 F. R. 778 (C. C. A. 7th Cir.) It does not ordinarily include suits by the trustees against third persons. The word is frequently used in the General Orders; always, I think, in the same sense (e. g., in the preamble, and in orders I., IV., V., VIII., XXI., XXXV.); when it is intended to refer to suits in equity or actions at law, they are distinctly specified (G. O. XXXVII.). It seems to me that "proceedings," in the order under discussion, is used in its established meaning as applied to bankruptcy matters, and that it does not include suits brought by the trustee against third persons in respect to property not in the custody of the Bankruptcy Court.

If the order of reference be construed as broadly as the plaintiff desires, it is questionable whether it would be valid. It would amount to a peculiar delegation of the general equity powers of the court, the exact limits of which, territorial or otherwise, it is not easy to understand. If it be regarded as covering all controversies to which the trustee in the case referred might be a party—which is the view of the referee as I understand it—the effect is to create a new court, having concurrent jurisdiction in equity with the State courts, and possibly with the District Court, as to cases in which a certain person, viz., the trustee in bankruptcy of the estate referred may be a party.

In In re Steuer, 5 A. B. R. 209 (D. C. Mass.), where a plenary suit of this character was heard before the referee without objection, Judge Lowell, with "great doubt" held that the District Court had jurisdiction to make a decree in favor of the complainant; and he ordered that the decree issue as if made originally by the judge, and not simply as an affirmance of the decree of the referee.

30 It seems that if the objection had been seasonably taken and insisted upon, as it was in this case, a different result would have been reached. In In re Carlisle, 29 A. B. R. 373 (D. C. N. C.), in In re Walsh Bros. (D. C. Ia.), 163 F. R. 352, and in In re Overholzer, 23 A. B. R. 10 (an able opinion by the referee), it was explicitly held that the referee did not have jurisdiction of a

plenary suit of this character. The weight of opinion among the text writers is in the same direction. Remington on Bankruptcy, 2d ed., secs. 545 and 1695, collecting cases; Loveland on Bankruptcy, 4th ed., Sec. 37. Collier on Bankruptcy, 10th ed., p. 595, says that the question is doubtful. "And there are instances where such jurisdiction has been asserted and fully sustained by the District Court," but the cases cited do not support the statement. In In re O'Brien, 21 A. B. R. 11, Referee Olmstead, in this district, took jurisdiction of a plenary suit and appointed receivers, but it was done by agreement of the respondents. In In re Shultz & Mark, 11 A. B. R. 690, the referee held, in a long opinion, that under a special rule in that district he had jurisdiction against objections thereto. It is the only express decision in the plaintiff's favor which has been brought to my attention.

It seems to me that, both upon the better reasoning and upon the great weight of authority, the referee has no jurisdiction of plenary suits of this character. They often involve very substantial amounts,—in this case, for instance, from $7,000 to $12,000,—and I think they should be filed like other suits in equity in the District Court, or in the proper State Court.

There must be an order vacating the referee's decree and dismissing the bill, with costs, as taxed in an equity suit in this court.

[Endorsed:] 23319. J. Herbert Weidhorn. Opinion.

31 K.

In the District Court of the United States for the District of Massachusetts.

No. 23319, In Bankruptcy.

In the Matter of J. HERBERT WEIDHORN, Bankrupt.

At Boston, in said District, on the eighth day of March, A. D. 1917, upon the question certified to the court by the referee in said matter on the second day of October, A. D. 1916:

Now, therefore, after hearing arguments of Percy A. Atherton, Esquire, of counsel for the trustee, and William M. Blatt, Esquire, counsel for the respondents, and after due consideration of the same,

It is hereby ordered and decreed that the order of the referee be, and it hereby is, vacated, and the bill dismissed, with costs.

It is further ordered that the clerk send a copy of this order by mail to the referee.

Witness, the Honorable James M. Morton, Jr., Judge of said court, and the seal thereof, this eighth day of March, A. D. 1917.

[L. S.] MARY E. PRENDERGAST,
Deputy Clerk.

[Endorsed:] No. 23319. In Bankruptcy. Law of 1898. J. Herbert Weidhorn, Bankrupt. Order on Certified Question.

32 *Answer in Lieu of Motion to Dismiss and Further Answer of Leo Weidhorn to the Petition of Benjamin A. Levy, Trustee, to Revise in Matter of Law the Proceedings of the District Court.*

[Filed October 10, 1917.]

To the Honorable the Judges of the Circuit Court of Appeals for the First Circuit:

The said Leo Weidhorn, especially appearing for the purpose of this answer and no other, and asserting that this court has no jurisdiction over it, or over the subject-matter mentioned in said petition, and not assenting to the bringing of said petition in this court, for answer thereto says:

Answer in Lieu of Motion to Dismiss.

For answer in lieu of a motion to dismiss the aforesaid petition the respondent says that it appears upon the face of the petition and the accompanying record,—

(1) That this is a petition to revise the proceedings of the District Court;

(2) That the matter involved in these proceedings is not a bankruptcy proceeding contemplated by Section 24*b* of the Bankruptcy Law of 1898.

And there being no jurisdiction conferred upon this Honorable Court to revise the proceedings of the District Court except by said Section 24*b* of the Bankruptcy Law, this Honorable Court is without jurisdiction to entertain the above-entitled petition for revision.

Wherefore, the said responedent moves this Honorable Court that this petition for revision be dismissed.

Further Answer.

And for further answer the respondent, not waiving, but relying upon his answer in lieu of a motion to dismiss, says:

First. The respondent admits the allegations contained in the first, second, third, fourth and fifth paragraphs of the petition to revise now before this Honorable Court.

33-34 Second. That as to the sixth paragraph the respondent denies that the court erred in any of the respects therein enumerated.

Wherefore, the respondent prays that the said petition be dismissed with costs.

LEO WEIDHORN,
By His Attorney, WILLIAM M. BLATT.

STATE OF MASSACHUSETTS,
Suffolk, ss:

Boston, October 10, 1917.

Then personally appeared William M. Blatt, and made oath that he is the attorney for the above-named Leo Weidhorn; that as attorney for said Leo Weidhorn he is authorized to sign and make oath to the foregoing answer on *their* behalf and for and on *their* behalf made oath to the truth of the statements of fact set forth in the foregoing answer.

Before me,
[SEAL.] ARTHUR I. CHARRON,
Notary Public.

35 United States Circuit Court of Appeals for the First Circuit, October Term, 1917.

No. 1302 (Original).

BENJAMIN A. LEVY, Trustee, Petitioner.

In the Matter of J. HERBERT WEIDHORN, Bankrupt.

Petition of Benjamin A. Levy, Trustee, to Revise in Matter of Law the Proceedings of the District Court.

Stipulation.

[Filed and Approved March 28, 1918.]

It is hereby stipulated in the above-entitled case that the annexed subpœna and return of service thereon may be printed as part of the record in this case, and used and considered in place of Exhibits B and C, on pages 12 and 13 of said record.

SWIFT, FRIEDMAN & ATHERTON,
Attorneys for Petitioner.
WM. M. BLATT, *Attorney for Respondent.*

36 B and C.

MASSACHUSETTS DISTRICT, *ss:*

[L. S.]

The President of the United States of America to Leo Weidhorn and The Boston Storage Warehouse Company, Greeting:

For certain causes, offered before the District Court of the United States of America, within and for the Massachusetts District, as a court of bankruptcy, we command and strictly enjoin you, laying all other matters aside, and notwithstanding any excuse, that you personally appear before our said court, sitting in bankruptcy, at the office of the referee's clerk of said court, in Boston, in said dis-

trict, on or before the twentieth day after service of this subpœna, and then and there file your answer or other defense to a bill of complaint exhibited against you in our said court, wherein Benjamin A. Levy, trustee in bankruptcy of the estate of J. Herbert Weidhorn, is the complainant, and you are the respondents, having been made parties to these proceedings, and are temporarily enjoined as prayed for in said bill of complaint; and to do further and receive that which our said District Court, sitting in bankruptcy, shall consider in this behalf. And this you are in nowise to omit, under the pains and penalties of what may befall hereon.

And the marshal of said District of Massachusetts, or his deputy, is hereby commanded to make service of this subpœna and to return the same with his doings thereon into the office of the clerk of our said court on or before the twenty-fourth day of April, 1916.

Witness, the Honorable James M. Morton, Jr., at Boston, this first day of April, A. D. 1916, in the one hundred and fortieth year of the Independence of the United States of America.

MARY E. PRENDERGAST,
Deputy Clerk.

[MEMORANDUM.—The respondents are required to file their answer or other defense in the referee's clerk's office on or before the twentieth day after service, excluding the day thereof; otherwise the bill may be taken pro confesso.]

37-38 UNITED STATES OF AMERICA,
Massachusetts District, ss:

Boston, April 3, 1916.

I hereby certify that I have served the within subpœna on the within-named Leo Weidhorn, by giving to him in hand a true and attested copy of this subpœna, at 120 Water Street, Boston, in said district, and afterwards on the same day I served the within subpœna on the within-named Boston Storage Warehouse Company, by giving in hand to Edward L. Wingate, general manager thereof, a true and attested copy of this subpœna, at Westland Avenue, Boston, in said district.

JOHN J. MITCHELL,
United States Marshal,
By JAMES A. TIGHE, *Deputy.*

Fees.

Service	$4.00
Copies	.60
Travel	.18
	$4.78

[Endorsed:] No. 23,319. In Bankruptcy. Benjamin A. Levy, Trustee, v. Leo Weidhorn et al. Subpœna, Returnable April 24,

1916. Marshal's No. 704. United States Marshal's Office, Boston, Mass., Apr. 3, 1916. P. O. Building. Swift, Friedman & Atherton, Attorneys, 30 State St., Boston, Mass. Filed April 11, 1916.

39 United States Circuit Court of Appeals for the First Circuit, October Term, 1917.

No. 1302 (Original).

BENJAMIN A. LEVY, Trustee, Petitioner.

In the Matter of J. HERBERT WEIDHORN, Bankrupt.

Petition of Benjamin A. Levy, Trustee to Revise in Matter of Law the Proceedings of the District Court.

Before Dodge, Bingham and Johnson, JJ.

Opinion of the Court.

May 28, 1918.

DODGE, *J.:*

The order or decree of the District Court which this petition seeks to revise directed the vacation of a decree made by the referee upon a bill in equity, filed and answered before him, and sustained by him after hearing the merits of the case as in plenary proceedings before the court; and it directed the dismissal of the bill on the ground that the referee had been without jurisdiction so to entertain or hear it.

1. We are asked to dismiss the petition to revise on the ground that it is not a petition within Sec. 24*b* of the Bankruptcy Act. It is contended that the question raised as to the referee's jurisdiction can be brought before us only by appeal under Sec. 24*a*.

The bill in equity, filed by the trustee in bankruptcy of the estate under administration, sought to avoid two conveyances
40 by the bankrupt to his brother, on the alleged ground that they had been made with intent to hinder, delay or defraud his creditors. The referee held the conveyances void, and ordered the defendant to account for or restore the property transferred.

The defendant's petition for review of the referee's decree by the District Court alleged only that the above findings and conclusions were not justified by the evidence. It did not allege that the referee had acted without jurisdiction. The referee's certificate to the District Judge, however, recited that the defendants had contended "that the referee, sitting as a court of bankruptcy, has no jurisdiction," and that he had ruled to the contrary. The District Judge dealt only with the question of jurisdiction, undertaking no consideration of the merits of the controversy passed upon by the referee.

The trustee's present petition to this court, while it asks reversal

of the decree of dismissal, and for affirmance of the decree entered by the referee, raises before us only the question of the referee's jurisdiction. If he had jurisdiction, his result on the merits remains to be reviewed by the District Court.

Since the petition before us thus presents only the preliminary question of the referee's jurisdiction to proceed on the bill before him, we think it raises rather a question of procedure, under Sec. 24*b*, than a "controversy arising in bankruptcy proceedings," within the meaning of Sec. 24*a*. Such "controversies" arise over steps in bankruptcy proceedings which the court or referee has jurisdiction to take or refuse to take. When the referee's jurisdiction to investigate the merits of a controversy like this in summary proceedings is attacked, the question is properly raised before the Appellate Court by petition to revise an order of the District Court sustaining such jurisdiction. Schweer v. Brown, 195 U. S. 171. Shea v. Lewis, 206 F. R. 877; Gibbon v. Goldsmith, 222 F. R. 826. We see no sufficient reason to doubt that the question raised by a denial of the referee's jurisdiction to investigate the merits of such a controversy under the forms of a plenary suit, may be equally well raised by peti-
41 tion to revise. The question is one of law only. That a result on the merits, had there been jurisdiction, could have been reviewed here only on appeal, does not prove that we are without power to determine the question of jurisdiction under such a petition as this.

2. The case had been referred generally, under Sec. 22 of the Bankruptcy Act, and according to General Order XII. The reference was not for any special or limited purpose. According to Clause 1 of said General Order,

"all the proceedings except such as are required by the Act or by these General Orders to be had before the Judge,"

were thereafter to be had before the referee, and according to Clause 2 of said order, the referee was thereafter to perform the duties which he was "empowered by this act to perform" in the matters arising in the case referred to him. We are unable to agree with the learned District Judge that "all the proceedings," in Clause 1, must be taken to mean only such proceedings of the bankruptcy courts as have been distinguished from controversies arising in bankruptcy proceedings for the purposes of Sec. 24. We think the order requires a broader construction, in view of all its provisions and of other provisions applicable, found in the Act.

Nothing either in the Act or in the General Orders expressly requires the proceedings upon a bill filed by a trustee like this, whereof "any court of bankruptcy" has jurisdiction under Sec. 70 (*e*), to be had before the judge. On the contrary, Sec. 38 (4) invests the referee with jurisdiction, "subject always to a review by the judge,"—

"to perform such part of the duties (with express exceptions not here applicable) as are by this act conferred on courts of bankruptcy and as shall be prescribed by rules or orders * * * except as herein otherwise provided."

Neither in the Act or the Rules or the Orders referred to are any provisions found which exclude such cases from the general operation of this section. The jurisdiction given by Sec. 70*e*, over such a proceeding, is in equity, as affording a remedy more adequate and complete than can be had at law. Wall v. Cox, 101 F. R. 403; Pond v. New York etc. Bank, 124 F. R. 992; Davis v. Gates, 235 F. R. 192,
195. There are certain injunctions which only the judge can
42 order,—Gen. Order XII. 3; but no such injunction was sought by the bill which the trustee filed.

Sec. 42 (*a*) of the Act provides for the keeping of records of proceedings in cases before the referee corresponding to those kept in equity cases before the Federal courts. Sec. 42 (*c*) makes the records so kept part of the records of the court, when certified and transmitted by the referee as there required. By General Order III. process, summons and subpœnas, under the court's seal and signed by the clerk, are to be furnished referees upon application therefor. In view of these provisions, we are not prepared to agree with the District Judge that to affirm the referee's jurisdiction in cases like this would amount to creating a new court having concurrent equity jurisdiction with the State courts and with the District Court. The jurisdiction so exercised would be that of the District Court as a court of bankruptcy, though exercised by an officer of that court given, for defined purposes, the powers of the court, with the right to issue its process; always, of course, subject to review by the judge.

Sec. 1. (7) of the Act provides that "courts" as used in the Act may include the referee; and for the purposes here material we think Sec. 38 (4) must be taken as intending to make that word as there used include the referee.

From the sections of the Act above referred to an intent on the part of Congress may reasonably be inferred to permit the exercise of all functions of the bankruptcy courts not specifically excepted, by a number of local officers of the court, easily accessible throughout each district; instead of empowering the District Judge alone to exercise them, at the statutory places for holding his court. The provisions have been recognized as manifesting such an intention. Remington, Bankruptcy, 2d ed., secs. 496, 501. Re Steuer, 104 F. R. 976, 980.

We find no decisive objection to the above view in the fact that matters involving considerable amounts will be thereby often left to the referee's determination in the first instance. The same is true regarding matters as to which the referee's jurisdiction under the Act is unquestioned. It is true that the referee cannot punish for the
contempts referred to in Sec. 41, but must certify the facts to
43 the judge for his action. This, however, is only matter of procedure and is also applicable to proceedings whereof the referee's jurisdiction is unquestioned. That the referee has jurisdiction to act upon such a bill is the view which seems to us most in accordance with the general scheme contemplated by the Act for the primary hearing and determination of such controversies as are likely to arise between trustees of estates and adverse claimants. If the property in controversy here had been in the trustee's possession

and claimed from him, or a lien upon it asserted, by the defendant, the referee's jurisdiction would have been undeniable, though the above objections to its exercise would have been no less applicable.

Such a construction of the above provisions of the Act involves no substantial prejudice to any right of a defendant against whom such a bill is brought. If it were addressed to the judge instead of the referee, filed not with the referee but in the clerk's office, and heard by the referee under directions from the court to ascertain the facts and report thereon, no one would doubt that the "duties conferred upon the bankruptcy court" in the case had been so for properly performed. The referee's report, with the evidence before him if necessary, would then come before the District Judge for confirmation or disaffirmance, and the final decree of the court accordingly would follow. If heard and decided by the referee, as in this case, a petition for review would also bring the whole matter with the evidence heard, before the judge, whose order affirming or disaffirming that made by the referee would also amount to a final decree by the District Court. We see no difference between the two methods of reaching a final result in the District Court sufficiently important to require the conclusion that the latter method cannot be one contemplated by the Act. It will always be in the judge's power to prevent its adoption, as was not done here, by limiting the powers given the referee, in the order of reference.

No court of appeals has yet passed upon the question here raised. Conflicting decisions regarding it may be found, made in other district courts either by the judge or a referee. In this district the decisions prior to that here appealed from have tended to sustain
44 the referee's jurisdiction. Re Steuer, 104 F. R. 976; Re Scherber, 131 F. R. 121, are the earliest in date which refer to the question. Neither decides it, but the suggestions regarding it in Re Steuer show much disinclination on the part of the court to hold the referee wholly without jurisdiction. Jurisdiction has been exercised by the referee in similar cases, and its exercise, apparent from the record, and therefore subject to disapproval by the court at any stage of the proceedings, has met with no objection either from the parties or from the courts either on review or appeal, in not a few reported cases in this and other circuits. See particularly Clarke v. Rogers, 183 F. R. 518; 228 U. S. 534; Studley v. Bank, 200 F. R. 249; 229 U. S. 523. We find no reason sufficient to require a decision involving the conclusion that the referee's jurisdiction was exercised in all such cases without statutory warrant, and must regard the decision that it was unlawfully exercised in this case as erroneous. We reach this conclusion without reference to the question whether or not there was seasonable objection to the jurisdiction by the defendant. It is not contended that his consent could have given a jurisdiction not given by the Act.

Let there be a decree reversing the decree of the District Court, and remanding the case to that court for further proceedings in accordance with this opinion. The trustee in bankruptcy recovers his costs in this court.

45 On April 16, 1918, this case came on to be heard by the court, Honorable Frederic Dodge, Honorable George H. Bingham and Honorable Charles F. Johnson, Circuit Judges, sitting:—

Thereafter, to wit, on May 28, 1918, the Opinion of the Court (page 39) was announced, and the following Order of Court was entered:—

Order of Court.

May 28, 1918.

Let there be a decree reversing the decree of the District Court and remanding the case to that court for further proceedings in accordance with the opinion passed down this day. The trustee in bankruptcy recovers his costs in this court.

By the Court,

ARTHUR I. CHARRON, *Clerk.*

Thereafter, to wit, on June 14, 1918, the following Final Decree was entered:—

Final Decree.

June 14, 1918.

This cause came on to be heard on April 16, 1918, upon the petition of Benjamin A. Levy, Trustee, to revise in matter of law the proceedings of the District Court for the District of Massachusetts, and answer thereto, and was argued by counsel.

Upon consideration thereof, it is hereby ordered, adjudged and decreed as follows: The decree of said District Court entered March 8, 1917, dimissing the bill in equity filed by the said Benjamin A. Levy, trustee, against Leo Weidhorn and another, in the matter of J. Herbert Weidhorn, bankrupt, No. 23319 in bankruptcy, is hereby reversed, and the case remanded to said District Court for further proceedings in accordance with the opinion of this court passed down May 28, 1918; and the petitioner recovers costs in this court.

By the Court,

ARTHUR I. CHARRON, *Clerk.*

46 Assented to as to form only.

WILLIAM M. BLATT,
Attorney for Respondent.

Thereafter, to wit, on July 30, 1918, the following Motion for Stay of Mandate was filed by the respondent:—

Motion for Stay of Mandate.

[Filed July 30, 1918.]

And now comes Leo Weidhorn, respondent in the above matter, and moves this Honorable Court that the mandate therein be stayed

until further order of the court for the reason that the respondent intends to petition the United States Supreme Court for a writ of certiorari in said matter.

WILLIAM M. BLATT,
Attorney for Respondent.

On the same day, to wit, July 30, 1918, the following Order of Court was entered:—

Order of Court.

July 30, 1918.

Upon motion of the respondent setting forth that he proposes to file a petition in the Supreme Court for a writ of certiorari, It is ordered that the mandate in this case be, and the same hereby is, stayed until further order of this court upon the condition that said petition is duly filed and presented within the time prescribed by the rules and practices of the Supreme Court of the United states.

By the Court,

ARTHUR I. CHARRON, *Clerk.*

Clerk's Certificate.

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the printed pages numbered 1 to 46, inclusive, hereto prefixed, contain and are
47 a true copy of the record and all proceedings to and including August 1, 1918, in the cause in said court, numbered and entitled, No. 1302 (Original). Benjamin A. Levy, Trustee, Petitioner. In the Matter of J. Herbert Weidhorn, Bankrupt.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this first day of August, A. D. 1918.

[Seal United States Circuit Court of Appeals First Circuit.]

ARTHUR I. CHARRON, *Clerk.*

48 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the First Circuit, Greeting:

Being informed that there is now pending before you a suit entitled Benjamin A. Levy, Trustee, petitioner, (In the matter of J. Herbert Weidhorn, Bankrupt), No. 1302, Original, which suit was removed into the said Circuit Court of Appeals by virtue of a petition to revise, and we, being willing for certain reasons that the said

cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you
49 send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the thirty-first day of October, in the year of our Lord one thousand nine hundred and eighteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 26742. Supreme Court of the United States, October Term, 1918. No. 656. Leo Weidhorn vs. Benjamin A. Levy, Trustee, etc. Writ of Certiorari.

50 *Return on Writ of Certiorari.*

United States Circuit Court of Appeals for the First Circuit.

And now the Judges of the United States Circuit Court of Appeals for the First Circuit make return of this writ by annexing hereto and sending herewith a stipulation between counsel for the respective parties in the cause in the Supreme Court of the United States wherein this writ of certiorari issued, "that the certified transcript of record herein on file in the office of the Clerk of the Supreme Court of the United States in the matter of Leo Weidhorn, petitioner for a writ of Certiorari against Benjamin Levy, trustee, respondent, and there numbered 656 of October Term, 1918, upon the docket of said court, may be taken as a return by this Court to the writ of Certiorari issued by the Supreme Court of the United States in the said case."

In testimony whereof, I, Arthur I. Charron, Clerk of said United States Circuit Court of Appeals for the First Circuit hereto set my hand and affix the seal of said court at Boston, in said First Circuit, this seventh day of November, A. D. 1918.

[Seal United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON, *Clerk.*

51 United States Circuit Court of Appeals for the First Circuit.

No. 1302 (Original).

BENJAMIN A. LEVY, Trustee, Petitioner.

Stipulation.

(Filed November 7, 1918.)

In the above entitled action it is hereby stipulated that the certified transcript of record herein on file in the office of the Clerk of the Supreme Court of the United States in the matter of Leo Weidhorn, petitioner for a writ of Certiorari against Benjamin Levy, trustee, respondent, and there numbered 656 of October Term, 1918, upon the docket of said court, may be taken as a return by this Court to the writ of Certiorari issued by the Supreme Court of the United States in said case.

WALTER HARTSTONE,
WILLIAM M. BLATT,
Attorney- for Leo Weidhorn.
LEE M. FRIEDMAN,
Attorney for Benjamin A. Levy.

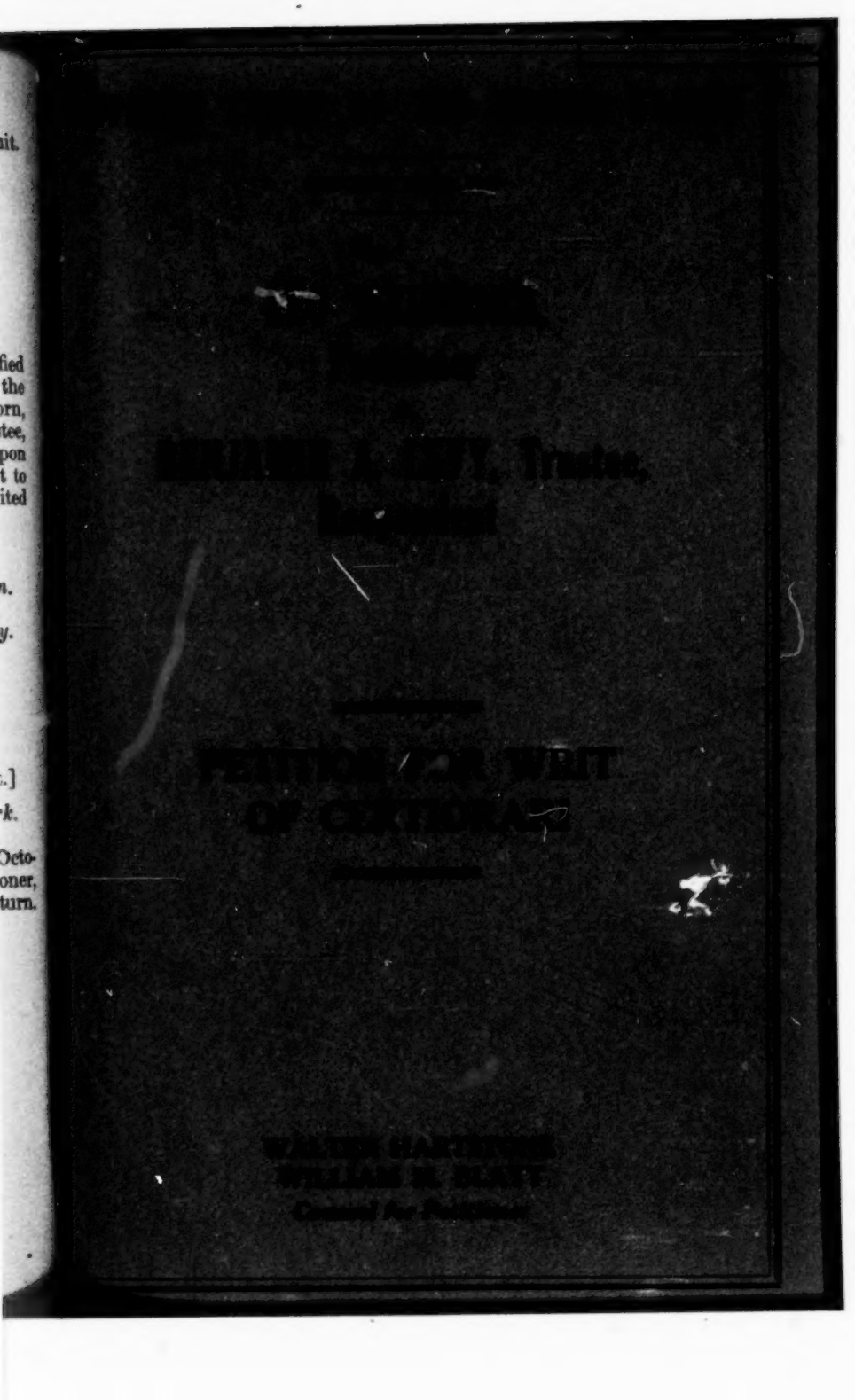
Dated, Boston, November 7, 1918.

A true copy:
Attest:

[Seal United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON, *Clerk.*

52 [Endorsed:] File No. 26,742. Supreme Court U. S., October Term, 1918. Term No. 656. Leo Weidhorn, Petitioner, vs. Benjamin A. Levy, Trustee, etc. Writ of certiorari and return. Filed November 9, 1918.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917

No.

LEO WEIDHORN,
Petitioner

v.

BENJAMIN A. LEVY, Trustee,
Respondent

PETITION FOR WRIT OF CERTIORARI

WALTER HARTSTONE
WILLIAM M. BLATT
Counsel for Petitioner

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No.

LEO WEINHORN,

Petitioner

v.

BENJAMIN A. LEVY, Trustee,

Respondent

PETITION FOR WRIT OF CERTIORARI

WALTER HARRISTONE
WILLIAM M. SLATT
Counsel for Petitioner

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

No.

LEO WEIDHORN, PETITIONER

v.

BENJAMIN A. LEVY, Trustee, RESPONDENT.

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

The petitioner, Leo Weidhorn, respectfully shows to this Honorable Court, as follows:—

The respondent, Benjamin A. Levy, in his capacity as trustee in Bankruptcy of the Estate of J. Herbert Weidhorn, filed a petition in the form of a Bill in Equity (Transcript, p. 5) against the petitioner, Leo Weidhorn, in the office of the Referee in Bankruptcy to whom the said Bankrupt's case had been referred. The petition alleged that the said Leo Weidhorn, a brother of the bankrupt, had, for the purpose of defrauding the creditors of the bankrupt, taken a chattel mortgage of practically all the bankrupt's assets more than four months before the said J. Herbert Weidhorn filed his voluntary petition in bankruptcy, and that the said Leo Weidhorn had fraudulently foreclosed said mortgage a few days before said petition.

The then respondent, Leo Weidhorn, before the hearing in the Referee's Court, filed an objection to the jurisdiction of the referee (Transcript, p. 17) and objected again at the hearing. (Transcript, p. 26).

The property in question has been, since the said foreclosure, stored in a public warehouse by, and in the name of the said Leo Weidhorn.

The Referee heard the evidence, found that the conveyances were fraudulent, declared them void, and ordered a conveyance to the Trustee in Bankruptcy of the said J. Herbert Weidhorn. (Transcript, p. 18).

Leo Weidhorn then petitioned to the District Court for a review of this decree, and the District Judge, after hearing, vacated the decree on the ground that the Referee exceeded his powers under the order of reference, which reference was made under General Orders XII (1), the District Court holding that the words "all proceedings" in that order do not include suits brought by a Trustee in Bankruptcy against third persons in respect to property not in the custody of the Bankruptcy Court. (Transcript, p. 27).

The Trustee in Bankruptcy then brought a Petition to Revise this decree under section 24b of the Bankruptcy Act in the Circuit Court of Appeals for the First Circuit, alleging that the District Court erred in the foregoing rulings. (Transcript, p. 1).

Leo Weidhorn, answering the Petition to Revise, pleaded

(1) That the application to the Circuit Court of Appeals should have been by appeal under section 24a of the Bankruptcy Act, and not under section 24b, and

(2) That the District Court did not err in finding that the Referee was without jurisdiction to make the decree which he recorded.

After hearing, the Honorable Circuit Court of Appeals, acting upon the aforesaid Petition to Revise, reversed the findings of the District Court on the ground that the Referee had jurisdiction of the original controversy and authority to make the decree which he made, and that the matter was properly brought before the Circuit Court of Appeals by the Petition to Revise. The case was remanded for further findings and proceedings on the merits. (Transcript, p. 39). An order and final decree were subsequently entered in accordance therewith. (Transcript, p. 45).

The petitioner submits that the learned Circuit Court of Appeals erred in the following particulars, and prays that this Honorable Court will examine and review the record in this case and revise the rulings of the learned Circuit Court of Appeals.

(1) The Court erred in ruling that the proceeding before it was properly brought as a Petition to Revise under section 24b of the Bankruptcy Act.

(2) The Court erred in ruling that under the terms of General Order XII (1) a reference by the District Judge to the Referee of an estate in Bankruptcy included the authority to hear and determine the issues raised by the so-called bill of complaint herein referred to, and to decree a conveyance of the property involved from the said Leo Weidhorn to the Trustee in Bankruptcy.

(3) The Court erred in ruling that the District Judge was without power, upon a Petition to Review, to find that the Referee, to whom he had referred the original bankruptcy case, exceeded the authority given him by the terms of reference, and erred also in ruling that the District Judge was not justified in vacating the decree of the Referee on that ground.

(4) The court erred in ruling that under a general reference the Referee had jurisdiction by section 38 (4), taken in connection with section 70 (e) of the Bankruptcy Act, to hear and determine the issues raised by the so-called bill of complaint herein referred to and decree a conveyance to the trustee in Bankruptcy of property in the possession of a person not a party to the bankruptcy proceedings.

(5) The court erred in ruling that there should be a decree reversing the decree of the District Court and awarding costs to the Trustee in Bankruptcy.

It is extremely important that the practice on this constantly recurring situation should be uniform and that it should be established whether or not the Referee in Bankruptcy has jurisdiction of actions in which the Trustee in

Bankruptcy attempts to obtain a conveyance to him, from a person in possession, not a party to the Bankruptcy proceedings, of property alleged to have been fraudulently conveyed to him by the bankrupt long before the Bankruptcy proceedings.

Wherefore your petitioner prays that the whole record may be examined, reviewed and revised by this Honorable Court and that such orders may be made as Justice may require.

And your petitioner respectfully prays that a writ of CERTIORARI be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the first circuit, commanding said Court to verify and send to this Court on a day certain, to be therein designated, a full and complete transcript of the record of all proceedings of said Circuit Court of Appeals in this case (which was entitled in that Court Benjamin A. Levy, Trustee, Petitioner, in the matter of J. Herbert Weidhorn, Bankrupt, and numbered 1302 on the docket of said Court) to the end that said cause may be reviewed and determined by this Court as provided by law, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate, and that said judgment of the said Circuit Court of Appeals may be reversed by this Honorable Court.

LEO WEIDHORN,

By his attorneys,

WALTER HARTSTONE,

WILLIAM M. BLATT.

State of Massachusetts

County of Suffolk, ss. Boston, August 15th, 1918

William M. Blatt, being duly sworn, deposes and says that he is counsel for Leo Weidhorn, petitioner, that he pre-

pared the foregoing petition, and that the allegations therein contained are true to the best of his knowledge and belief.

Subscribed and sworn to, before me,

BENJAMIN SILBER,

(Seal) Notary Public.

I hereby certify that I have examined the foregoing petition and in my opinion the petition is well founded and the case is one in which the prayer of the petition should be granted.

WALTER HARTSTONE,

Counsel for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

LEO WEIDHORN, PETITIONER

v.

BENJAMIN A. LEVY, Trustee, RESPONDENT.

NOTICE.

The respondent is hereby notified that the petitioner will, on Monday, the seventh day of October, 1918, upon his verified petition and a copy of the entire record in this cause, at the opening of the court on that day or as soon thereafter as counsel can be heard, submit a petition for a writ of certiorari, a copy of which, and of the brief in support thereof are herewith delivered to you, to the Supreme Court of the United States in its court room at the Capitol in the City of Washington, D. C.

WALTER HARTSTONE,
WILLIAM M. BLATT.
Counsel for Petitioner.

The foregoing notice is hereby accepted and delivery of a copy of the petition for writ of certiorari and brief in support of the petition hereby acknowledged.

LEE M. FRIEDMAN,
SWIFT, FRIEDMAN & ATHERTON.
Counsel for Respondent.

UPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917

No.

LEO WEIDHORN,
Petitioner

v.

BENJAMIN A. LEVY, Trustee,
Respondent

PETITION FOR WRIT OF CERTIORARI

Brief for Petitioner

WALTER HARTSTONE
WILLIAM M. BLATT
Counsel for Petitioner

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

No.

LEO WEIDHORN, PETITIONER
v.
BENJAMIN A. LEVY, Trustee, RESPONDENT.

BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The learned Circuit Court of Appeals, it is submitted, should not have entertained the Petition to Revise under section 24, sub-section b of the Bankruptcy Act, since that section does not apply to "controversies arising out of Bankruptcy proceedings," but only to "proceedings in Bankruptcy."

Coder v. *Arts,* 213 U.S. 223.

And a suit by a trustee against an adverse claimant having possession of the disputed property is clearly a "controversy," and not a "proceeding."

Hewit v. *Berlin Machine Works,* 194 U.S. 296.
Collier on Bankruptcy, 11th ed., p. 563, collecting cases.
In re Friend, 134 Fed., 778 (C.C.A.)
In re Loving, 224 U.S. 183.

And where the decree complained of is in relation to a plenary suit the exclusive remedy is by appeal under section 24a even though the only question before the Circuit Court of Appeals is a question of law.

Doroshaw v. *Ott,* 134 Fed., 740 (C.C.A., N.J.)
In re Rusch, 116 Fed. 270 (C.C.A., Wisc.)

II.

It is submitted that the learned Court of Appeals erred in ruling that the District Judge was not warranted in finding that the Referee exceeded his authority by the decree which he entered, ordering Leo Weidhorn to convey to the trustee the property which, it was alleged, had been fraudulently conveyed to him by the bankrupt more than four months before the bankruptcy proceedings.

HISTORICAL SUMMARY OF LEGISLATION.

a. Under the Bankruptcy Act of 1898 no jurisdiction was given to the courts of bankruptcy nor to the referee to compel adverse claimants to transfer to the trustee in bankruptcy property in the possession of such claimants before the bankruptcy proceedings were instituted.

Bardes v. *Hawarden Bank,* 178 U.S. 524.
Louisville Trust Co. v. *Comingor,* 178 U.S. 524.

b. In 1903 sections 60b, 67e, and 70e were amended (32 Stat. 797 c. 487), affecting the jurisdiction of bankruptcy courts in relation to suits under these sections. But it was held that the amendment still gave the courts of bankruptcy no jurisdiction to try actions brought under section 70e of the act without consent of the respondent.

Harris v. *Bank,* 216 U.S. 382.

c. A further amendment passed in 1910 (36 Stat. 840, c. 412) supplied section 23b with a clause whereby the missing power was presumably given to courts of bankruptcy to try actions brought by trustees under section 70e, that is, plenary actions to set aside fraudulent conveyances which could have been avoided by any creditor of the bankrupt in the State courts had not bankruptcy proceedings been instituted.

d. The original petition in this case was such an action (Transcript, p. 5), and was instituted in the office of the referee having charge of the case.

ARGUMENT.

1. The referee is not one of the "courts of bankruptcy" within the foregoing amendments.

The amendment to section 70e gives jurisdiction to "courts of bankruptcy as hereinbefore defined." The reference is obviously to section 1 (8) of the act which names only "the district courts of the United States and of the Territories, the Supreme Court of the District of Columbia, and the United States Court of the Indian Territory and of Alaska," thus excluding the referee's court; and although section 1 (7), in defining "court," says it *may* include the referee this must be taken as modified by section 1 (8), the meaning obviously being that for some purposes the referee is a court, but not by himself a court of bankruptcy.

Collier 1917 ed., p. 10
In re Walsh Bros., 163 Fed., 352 (D.C., Ia.)

Even if the referee be held to be a court of bankruptcy his special authority is defined by the act, which makes no mention of adverse claimants in c. V, secs. 38 and 39. If however the amendments of 1903 and 1910 conferred a latent jurisdiction it may be argued that by reference of the district judge under section 38a (4) he may acquire the active right to try cases like the one in question.

But section 38a (4) applies only to "duties," not "powers," under which latter word the right to entertain this controversy would come, whereas the word "duties" describes ministerial and obligatory acts of the nature of those enumerated in section 39.

2. Yielding, for the sake of discussion, and assuming that the proper order or rule of reference may give such authority, there was no such rule in this case.

The referee acted under General Orders XII (1), which provides that after a general reference "all proceedings, except such as are required by the act or these General

Orders to be before the Judge, shall be before the referee." If the referee had jurisdiction of the original suit, it must be because it was covered by the words, "all proceedings," in this order.

"Proceedings" has, in bankruptcy, a well-recognized, technical meaning. It has been defined under section 24, as—"covering questions between the alleged bankrupt and his creditors, as such, commencing with the petition for adjudication, ending with the discharge, and including matters of administration generally, such as appointment of receivers and trustees, sales, exemptions, allowances and the like, to be disposed of summarily, all of which naturally occur in the settlement of the estate;" Baker, J., *in re Friend*, 134 Fed. 778 (C. C. A. 7th Cir.). The word is frequently used in the General Orders; always in the same sense (*e.g.*, in the preamble, and in orders I., IV., V., VIII., XXI., XXXV.). When it is intended to refer to suits in equity or actions at law they are distinctly specified (G. O. XXXVII.).

3. Again granting, argumentatively, what is by no means really conceded, that G. O. XII (1) confers jurisdiction on the referee to try the case and make the decree which started this litigation, the district judge has the right under section 38a of the act to review acts of the referee. Surely this right of review includes the right to interpret the rule or order of reference and to find that the referee exceeded his instructions thereunder, which is what the district judge practically did.

A hearing before a referee is in the nature of a hearing in Equity and is governed by the rules of Equity procedure in the Federal Courts, both as to the hearing itself and as to review by the judge.

In re de Gottardi, 114 Fed. 228.

The judge has the right to limit the authority of the referee by rule or review and therefore by construction of the rule or order.

Equity Rule 72.

Though it is probably true, as the learned Circuit Court of Appeals declared, that the jurisdiction of the referee in this class of cases, under either of the amendments, has never been defined in a court of final jurisdiction it is nevertheless the opinion of the text book writers and such of the lower courts as have dealt positively with the subject that the referee has no such authority.

Remington on Bankruptcy, 2nd ed., secs. 545 and 1695, collecting cases.

Loveland on Bankruptcy, 10th ed., sec. 37.

In re Overholzer, 23 A. B. R. 10.

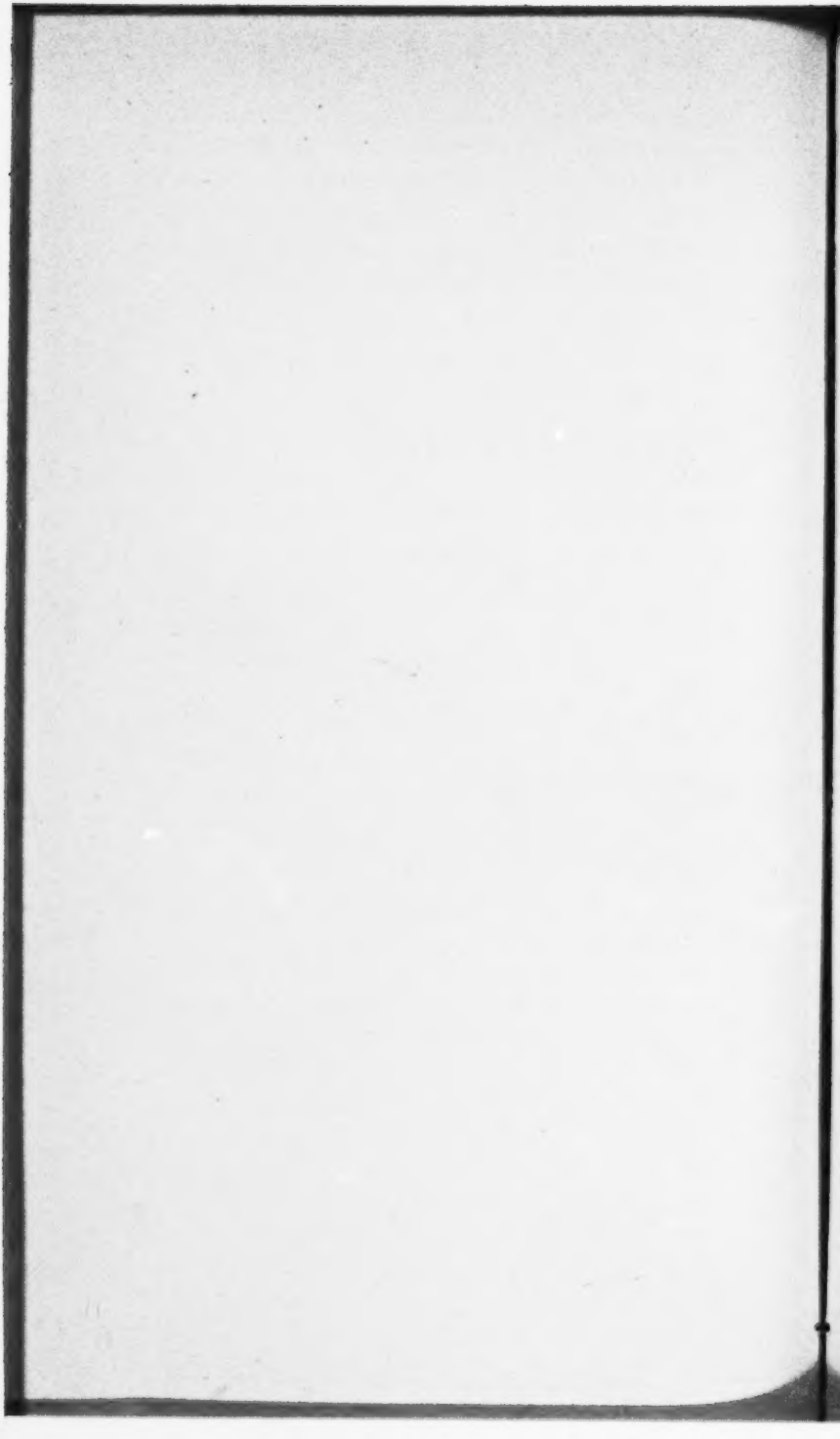
In re Carlile, 199 Fed. 612 (D.C., N.C.)

The referee's court is without adequate contempt powers to insure orderly trials (Bankr. Act, sec. 41), has no power to call for the assistance of a jury, and his whole establishment is obviously, and for obvious reasons, restricted to those functions which cannot as well be attended to in other courts, and it is submitted that the whole spirit of the bankruptcy act and of the decisions under it is incongruous with the idea of granting to him the right to entertain a plenary bill in equity, involving persons and property that have not before been brought within his jurisdiction.

WALTER HARTSTONE,

WILLIAM M. BLATT,

Counsel for Petitioner.



No. 655203

Supreme Court of the United States.

October Term, 1918.

LEO WEIDHORN,
PETITIONER,
v.
BENJAMIN A. LEVY,
TRUSTEE, RESPONDENT.

Brief for Respondent in Opposition to Petition for Writ of Certiorari.

While this case in certain aspects raises an important question of jurisdiction in bankruptcy practice, it does not possess those elements which justify taking the time of the Supreme Court for its further consideration.

POINT 1. NO CONFLICT OF DECISIONS.

The case is the only authoritative decision on the point at issue. There is, therefore, no contrariety of decisions between different Circuit Courts of Appeals on the subject.

POINT 2. THE DECISION OF LIMITED SCOPE.

The decision itself as it at present stands does not involve a large question of public importance or even of paramount significance in the practice under the

Bankruptcy Act. The scope of the decision is confined to an interpretation of an unlimited order of reference to a referee in bankruptcy under the General Orders in Bankruptcy XII and the provisions of the Bankruptcy Act relating to referees. The opinion of the Court points out that in any jurisdiction where the District Judge desires to limit the jurisdiction of his referees in cases referred to them he has that power of limiting their jurisdiction by an appropriate order of reference.

> "It will always be in the judge's power to prevent its adoption, as was not done here, by limiting the powers given the referee, in the order of reference."

Opinion of the Court (DODGE, J.) in Circuit Court of Appeals.

U.S. Revised Statute, §§ 566, 648.
Bankruptcy Act, § 22, *a* (1).

It is therefore respectfully submitted that no writ of certiorari ought to be granted in this case.

LEE M. FRIEDMAN,
SWIFT, FRIEDMAN & ATHERTON,
Counsel for Respondent.

REME COURT OF THE UNITED STATES

OCTOBER TERM, 1919

No. 203

LEO WEIDHORN,
Petitioner
v.
BENJAMIN A. LEVY, Trustee,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE FIRST CIRCUIT

Brief for Petitioner

WILLIAM M. BLATT
WALTER HARTSTONE
Counsel for Petitioner

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919

No. 203

LEO WEIDHORN,
Petitioner

v.

BENJAMIN A. LEVY, Trustee,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

Brief for Petitioner

WILLIAM M. BLATT
WALTER HARTSTONE
Counsel for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

No. 203 OCTOBER TERM, 1919.

LEO WEIDHORN, Petitioner
v.
BENJAMIN A. LEVY, Trustee, Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

BRIEF FOR PETITIONER

STATEMENT OF THE CASE.

May It Please the Court:

The respondent, Benjamin A. Levy, in his capacity as trustee in Bankruptcy of the Estate of J. Herbert Weidhorn, filed a petition in the form of a Bill in Equity (Transcript, p. 4) against the petitioner, Leo Weidhorn, in the office of the Referee in Bankruptcy to whom the said Bankrupt's case had been referred. The petition alleged that the said Leo Weidhorn, a brother of the bankrupt, had, for the purpose of defrauding the creditors of the bankrupt, taken a chattel mortgage of practically all the bankrupt's assets more than four months before the said J. Herbert Weidhorn filed his voluntary petition in bankruptcy, and that the said Leo Weidhorn had fraudulently foreclosed said mortgage a few days before said petition.

The then respondent, Leo Weidhorn, before the hearing in the Referee's Court, filed an objection to the jurisdiction of the referee (Transcript, p. 12) and objected again at the hearing (Transcript, p. 18).

The property in question has been, since the said foreclosure, stored in a public warehouse by, and in the name of the said Leo Weidhorn.

The Referee heard the evidence, found that the conveyances were fraudulent, declared them void, and ordered a conveyance to the Trustee in Bankruptcy of the said J. Herbert Weidhorn (Transcript, p. 13).

Leo Weidhorn then petitioned to the District Court for a review of this decree, and the District Judge, after hearing, vacated the decree on the ground that the Referee exceeded his powers under the order of reference, which reference was made under General Orders XII (1), the District Court holding that the words "all proceedings" in that order do not include suits brought by a Trustee in Bankruptcy against third persons in respect to property not in the custody of the Bankruptcy Court (Transcript, p. 19). The Court also denied the jurisdiction of the referee on other grounds (Transcript, p. 20).

The Trustee in Bankruptcy then brought a Petition to Revise this decree under section 24b of the Bankruptcy Act in the Circuit Court of Appeals for the First Circuit, alleging that the District Court erred in the foregoing rulings (Transcript, p. 1).

Leo Weidhorn, answering the Petition to Revise, pleaded

(1) That the application to the Circuit Court of Appeals should have been by appeal under section 24a of the Bankruptcy Act, and not under section 24b, and

(2) That the District Court did not err in finding that the Referee was without jurisdiction to make the decree which he recorded.

After hearing, the Honorable Circuit Court of Appeals, acting upon the aforesaid Petition to Revise, reversed the findings of the District Court on the ground that the Referee had jurisdiction of the original controversy and authority to make

the decree which he made, and that the matter was properly brought before the Circuit Court of Appeals by the Petition to Revise. The case was remanded for further findings and proceedings on the merits (Transcript, p. 29). An order and final decree were subsequently entered in accordance therewith (Transcript, p. 29). On July 30th, 1918, a Motion for Stay of Mandate was filed by the respondent (Transcript, p. 29). On the same day the mandate was stayed (Transcript, p. 30) until further order of the Court. On October 31st, 1918, on the petition of Leo Weidhorn to the Supreme Court of the United States a writ of certiorari was granted (Transcript, p. 31), and return duly made (Transcript, p. 31).

ASSIGNMENTS OF ERROR.

The petitioner submits that the learned Circuit Court of Appeals erred in the following particulars, and prays that this Honorable Court will examine and review the record in this case and revise the rulings of the learned Circuit Court of Appeals.

(1) The Court erred in ruling that the proceeding before it was properly brought as a Petition to Revise under section 24b of the Bankruptcy Act.

(2) The Court erred in ruling that under the terms of General Order XII (1) a reference by the District Judge to the Referee of an estate in Bankruptcy included the authority to hear and determine the issues raised by the so-called bill of complaint herein referred to, and to decree a conveyance of the property involved from the said Leo Weidhorn to the Trustee in Bankruptcy.

(3) The Court erred in ruling that the District Judge was without power, upon a Petition to Review, to find that the Referee, to whom he had referred the original bankruptcy case, exceeded the authority given him by the terms of reference, and erred also in ruling that the District Judge was not

justified in vacating the decree of the Referee on that ground.

(4) The Court erred in ruling that under a general reference the Referee had jurisdiction by section 38 (4), taken in connection with section 70 (e) of the Bankruptcy Act, to hear and determine the issues raised by the so-called bill of complaint herein referred to and decree a conveyance to the trustee in Bankruptcy of property in the possession of a person not a party to the bankruptcy proceedings.

(5) The Court erred in ruling that there should be a decree reversing the decree of the District Court and awarding costs to the Trustee in Bankruptcy.

ARGUMENT

I. INAPPROPRIATENESS OF PETITION TO REVISE.

The learned Circuit Court of Appeals, it is submitted, should not have entertained the Petition to Revise under section 24, sub-section b of the Bankruptcy Act.

Section 24b does not apply to "controversies arising out of Bankruptcy proceedings," but only to "proceedings in Bankruptcy."

Coder v. *Arts*, 213 U.S. 223.

And a suit by a trustee against an adverse claimant having possession of the disputed property is clearly a "controversy," and not a "proceeding."

Hewitt v. *Berlin Machine Works*, 194 U.S. 296.
Collier on Bankruptcy 11th ed., p. 563, collecting cases.
In re Friend, 134 Fed. 778 (C.C.A.).
In re Loving, 224 U.S. 183.

And where the decree complained of is in relation to a plenary suit the exclusive remedy is by appeal under section 24a even though the only question before the Circuit Court of Appeals is a question of law.

Doroshaw v. *Ott*, 134 Fed. 740 (C.C.A. N.J.).
In re Rusch, 116 Fed. 270 (C.C.A. Wisc.).

II. REFEREE'S LACK OF JURISDICTION

It is submitted that the learned Court of Appeals erred in ruling that the District Judge was not warranted in finding that the Referee exceeded his authority by the decree which he entered, ordering Leo Weidhorn to convey to the trustee the property which, it was alleged, had been fraudulently conveyed to him by the bankrupt more than four months before the bankruptcy proceedings.

Historical Summary of Legislation.

a. Under the Bankruptcy Act of 1898 no jurisdiction was given to the courts of bankruptcy nor to the referee to compel adverse claimants to transfer to the trustee in bankruptcy property in the possession of such claimants before the bankruptcy proceedings were instituted.

Bardes v. *Hawarden Bank,* 178 U.S. 524.
Louisville Trust Co. v. *Comingor,* 178 U.S. 524.

b. In 1903 sections 23b, 60b, 67e, and 70e were amended (32 Stat. 797, c. 487), affecting the jurisdiction of bankruptcy courts in relation to suits under these sections. But it was held that the amendment still gave the courts of bankruptcy no jurisdiction to try actions brought under section 70e of the act without consent of the respondent.

Harris v. *Bank,* 216 U.S. 382.

c. A further amendment passed in 1910 (36 Stat. 840, c. 412) supplied section 23b with a clause whereby the missing power was presumably given to courts of bankruptcy to try actions brought by trustees under section 70e, that is, plenary actions to set aside fraudulent conveyances which could have been avoided by any creditor of the bankrupt in the State courts had not bankruptcy proceedings been instituted.

d. The original petition in this case was such an action (Transcript, p. 4), and was instituted in the office of the referee having charge of the case.

Contentions.

1. The referee has no jurisdiction of controversies under section 70e of the Bankruptcy Act as amended.

The amendment to section 70e gives jurisdiction to any "court of bankruptcy as hereinbefore defined." The reference is obviously to section 1 (8) of the act which names only "the district courts of the United States and of the Territories, the Supreme Court of the District of Columbia, and the United States Court of the Indian Territory and of Alaska," thus excluding the referee's court as a court of original jurisdiction for such actions; and although section 1 (7), in defining "court," says it may include the referee this must be taken as modified by section 1 (8), the meaning obviously being that for some purposes the referee is a court, but not, by himself and considered separately, a court of bankruptcy.

Collier on Bankruptcy, 1917 ed., p. 10.
In re Walsh Bros., 163 Fed. 352 (D.C. Ia.).

In section 70e itself is contained a use of the word "Court" which obviously does not include the courts of bankruptcy ("Any State court" in the last sentence).

That the words "court of bankruptcy" do not always include the referee is shown in section 1 (16) of the act which provides that a "judge" of a "court of bankruptcy" does not include the referee.

See an interesting discussion in *In re Cobb*, 112 Fed. 655.

And in section 38 (4) another section vitally involved in this suit the words "courts of bankruptcy" are used in such a way as to assume that the referee is not a court of bankruptcy himself but is only "included" in the term when the context would otherwise create an anomaly.

This view does no violence to the amendment to section 70e. It recognizes that all courts of bankruptcy have jurisdiction. The District Court is named as one of the Courts of Bank-

ruptcy in section 1 (8) but the referee, though appointed by the District Court is only an officer with certain definite functions and powers and there is nothing in the amendment of 1910 to indicate that Congress intended to enlarge the powers of a special officer of a court but of the Court itself.

The referee's court is not a "court of bankruptcy" in itself, but only a branch of a court of bankruptcy, the District Court, and is without jurisdiction to act until a case is referred to him by the District Judge, and then only within the powers specifically given to him by the act. These powers are enumerated in section 38 and 39 of the Act and do not include the exercise of original jurisdiction over plenary suits in independent controversies not arising out of the regular administration of cases referred to him. It must therefore be inferred that even if the referee's court is a branch of a court of bankruptcy it is not intended by the 1903 and 1910 amendments to confer original jurisdiction on it in view of the intrinsic nature and purpose of the office.

And as a further indication of the intention of the statute is it not apparent that the amendments of 1903 and 1910 were not designed to authorize something which is manifestly impossible, to wit, the trial of a plenary *suit* in a court which has no machinery for such a proceeding?

Under the decision in *Harris* v. *Bank* (*supra*) and all other cases before the 1910 amendment it was clear that an adverse claimant could not be compelled by a trustee to give up property in the claimant's possession which had been fraudulently transferred by the bankrupt to him except by a plenary suit instituted in a state court or, with the consent of the defendant, in a court of bankruptcy. The 1910 amendment to section 23b did not change the law except to allow *suits* under section 70e to be brought without consent elsewhere than in the courts where the bankrupt might have prosecuted them if proceedings in bankruptcy had not been instituted. But the referee has neither the machinery nor the authority of the act in any of its other parts to entertain such a plenary suit.

The referee's court is without adequate contempt powers to insure orderly trials (Bankr. Act, sec. 41), has no power to call for the assistance of a jury, cannot exclude or otherwise control evidence as a true plenary suit requires, and his whole establishment is obviously, and for obvious reasons, restricted to those functions which cannot as well be attended to in other courts, or by the District Court proper, and it is submitted that the whole spirit of the bankruptcy act and of the decisions under it is incongruous with the idea of granting to him the right to entertain a plenary bill in equity, involving persons and property that have not before been brought within his jurisdiction.

Though it is probably true, as the learned Circuit Court of Appeals declared, that the jurisdiction of the referee in this class of cases, under either of the amendments, has never been defined in a court of final jurisdiction it is nevertheless the opinion of the text-book writers and such of the lower courts as have dealt positively with the subject that the referee has no such authority.

Remington on Bankruptcy (2d ed.), secs. 545 and 1695, collecting cases.

Loveland on Bankruptcy (10th ed.), sec. 37.

In re Overholzer, 23 A.B.R. 10.
In re Carlile, 199 Fed. 612 (D.C. N.C.).

Where the assumption of jurisdiction by the referee in these controversies has not been disturbed by the upper courts, the parties will be found to have consented thereto, or at least not to have protested before the decree.

2. Yielding, for the sake of discussion, and assuming that the proper order or rule of reference may give the referee authority to try controversies of this description, there was no such order or rule in this case.

As the District Judge says (Transcript, p. 19):

> "The duties of the referee do not begin until the case has been referred to him; and his jurisdiction, therefore, includes only such parts of the Bankruptcy jurisdiction of the District Court as are carried by the reference."

The reference was made under General Orders XII(1), which provides that, after a general reference, "all proceedings, except such as are required by the act or these General Orders to be before the Judge, shall be before the referee." If the referee had jurisdiction of the original suit, it must be because it was covered by the words, "all proceedings," in this order.

"Proceedings" has, in bankruptcy, a well-recognized, technical meaning. It has been defined under section 24, as—

> "covering questions between the alleged bankrupt and his creditors, as such, commencing with the petition for adjudication, ending with the discharge, and including matters of administration generally, such as appointment of receivers and trustees, sales, exemptions, allowances and the like, to be disposed of summarily, all of which naturally occur in the settlement of the estate;" BAKER, J., *In re Friend*, 134 Fed. 778 (C.C.A. 7th Cir.).

The word is frequently used in the General Orders; always in the same sense (*e.g.*, in the preamble, and in orders I., IV., V., VIII., XXI., XXXV.). When it is intended to refer to suits in equity or actions at law they are distinctly specified (G.O. XXXVII.).

Coder v. *Arts*, 213 U.S. 223.
Hewitt v. *Berlin Machine Works*, 194 U.S. 296.
In re Loring, 224 U.S. 183.

That the Order contemplates only "proceedings" in this technical sense is seen in the clause, "except such as are required by the act or these General Orders to be before the judge," it being obviously assumed that "controversies" (which by section 70e may be brought in the State courts), are

not "proceedings," and therefore need not be mentioned as exceptions (at the election of the trustee plaintiff) as, in the view of the present respondent, they are.

3. Again granting, argumentatively, what is by no means really conceded, that a proper order of reference might confer jurisdiction on the referee to try the case and make the decree which started this litigation, the district judge has the right under section 2(10) of the act to review acts of the referee. Surely this right of review includes the right to interpret the rule or order of reference and to find that the referee exceeded his instructions thereunder, which is what the district judge practically did.

A hearing before a referee is in the nature of a hearing in Equity and is governed by the rules of Equity procedure in the Federal Courts, both as to the hearing itself and as to review by the judge.

In re de Gottardi, 114 Fed. 228.

The judge has the right to limit the authority of the referee by rule or review and therefore by construction of the rule or order on review.

Equity Rule 72.

The Court of Appeals of the First Circuit should be reversed.

Respectfully submitted,

WILLIAM M. BLATT,
WALTER HARTSTONE,
Counsel for Petitioner.

BOSTON, MASSACHUSETTS,
October, 1919.

Supreme Court of the United States.

October Term, 1919.

No. 298.

LEO WEIDHORN,
PETITIONER,

v.

BENJAMIN A. LEVY, Trustee,
RESPONDENT.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

BRIEF FOR RESPONDENT.

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INDEX.

CASES CITED.

Supreme Court of the United States.

October Term, 1919.

No. 203.

LEO WEIDHORN, PETITIONER,

v.

BENJAMIN A. LEVY, TRUSTEE, RESPONDENT.

BRIEF FOR RESPONDENT.

Statement of Facts.

The respondent, as trustee in bankruptcy of J. Herbert Weidhorn, brought a bill in equity, under sections 67 and 70 of the Bankruptcy Act (Comp. St. 1916, § 9651 and § 9654), against the petitioner to recover property conveyed to him by his brother, the bankrupt, prior to the bankruptcy. The bill was filed in the office of the Referee in bankruptcy, to whom the case had been generally referred by the District Court under section 22 of the Bankruptcy Act (Comp. St. 1916, § 9606), according to General Order XII. The Referee caused process to issue thereon by the Clerk of the District Court under General Order III. Subsequently the case was heard upon its merits by the Referee, and a decree was entered holding the conveyances void and ordered the petitioner to account for or restore the property transferred.

The petitioner thereupon asked for a review of the

Referee's decree by the District Court on the ground that his findings and conclusions were not justified by the evidence. It was not alleged that the Referee acted without jurisdiction. We do not contend that consent of the petitioner could give jurisdiction if none was given by the Bankruptcy Act. We do not, therefore, advert to the question whether by appearing and answering to the merits there was seasonable objection to the Referee's jurisdiction by this petitioner.

The Referee's certificate to the District Court transmitted the evidence and also recited that the petitioner had contended "that the referee, sitting as a court of bankruptcy, has no jurisdiction," and that he had ruled to the contrary.

Without passing on the case on its merits, the District Court dealt only with the question of jurisdiction of the Referee, and ruled that he had no jurisdiction and ordered the bill dismissed.

The trustee in bankruptcy thereupon filed a petition to revise the proceedings of the District Court in the Circuit Court of Appeals for the First Circuit. After hearing, that Court by an unanimous decision (reported in 253 Fed. 28) ordered a decree reversing the decree of the District Court and held that the Referee had jurisdiction to entertain the bill in equity. The case was ordered remanded to the District Court for further proceedings.

There are but two issues involved in the present argument: *First.* Was a petition to revise the proper way to raise in the Circuit Court of Appeals the correctness of the ruling on the question of jurisdiction of the District Court? *Second.* Has a Referee in bankruptcy jurisdiction of plenary suits of this character?

ARGUMENT.

I.

A PETITION TO REVISE IN MATTER OF LAW THE PROCEEDINGS OF THE DISTRICT COURT WAS THE CORRECT METHOD TO BRING BEFORE THE CIRCUIT COURT OF APPEALS THE ISSUE.

The decision of the District Court dealt only with the question of jurisdiction. The Circuit Court of Appeals was only asked to determine the correctness of this one issue. The merits of the controversy were not considered. The sole question raised was as to the extent of a Referee's jurisdiction—a question of procedure.

If the judgment to be reviewed was a step in a bankruptcy proceeding, the remedy to correct an error of the District Court is by petition to revise under section 24*b* of the Bankruptcy Act (Comp. St. 1916, § 9608 (B)) If it was a controversy arising in a bankruptcy proceeding, then an appeal from the judgment of the District Court to the Circuit Court of Appeals under section 24*a* (Comp. St. 1916, § 9608 (A)) would have been correct.

Mason v. *Wolkowich,* 150 Fed. 699 (C.C.A. 1).

> "The distinction between 'proceedings in bankruptcy' reviewable under Section 24 (B) and the 'controversies arising in bankruptcy proceedings' appealable under Section 24 (A) is clearly defined; the former including 'administrative orders and decrees in the ordinary courses of bankruptcy between the filing of the petition and the final settlement of the estate,' and the latter including 'those independent or plenary suits which concern the bankrupt's estate and arise by intervention or

> otherwise between the trustees representing the bankrupt's estate and claimants representing some right or interest adverse to the bankrupt or his general creditors.' "

Barnes v. *Pampel,* 192 Fed. 525, 527 (C.C.A. 6).

It is now well settled that, where it is sought merely to present to the Circuit Court of Appeals a question as to whether a District Court erroneously exercised, or refused to exercise, jurisdiction to determine the merits of an adverse claim to property, the question of law so raised is a question of a bankruptcy proceeding, and is reviewable by a petition to revise under section 24*b* of the Bankruptcy Act.

Schweer v. *Brown,* 195 U.S. 171.
Gibbon v. *Goldsmith,* 222 Fed. 826 (C.C.A. 9).
Shea v. *Lewis,* 206 Fed. 877 (C.C.A. 8).
Graham v. *Faith,* 253 Fed. 32 (C.C.A. 1).

Gibbon v. *Goldsmith:*

> "This case presents the beclouded question which arises in nearly every case in which review of decisions in bankruptcy is sought in an appellate court. Is the remedy by appeal or by petition to revise? Is the judgment to be reviewed a step in a bankruptcy proceeding, or is it a controversy arising in a bankruptcy proceeding? The answer to the question in a case of this kind depends upon the nature of the proceeding in the bankruptcy court, and the questions which are to be presented for review to the appellate court. It is to be observed that the petitioner in this case does not attempt to bring before this court the merits of a controversy which was decided in the court below. She presents only the question of the jurisdiction of that court to deal with the subject-matter of the proceeding. The prayer of her petition is that it be adjudged that the District Court had no juris-

diction over any of the funds realized from the community property or the sale thereof, and had no jurisdiction to sell or dispose of said property, and no jurisdiction to determine in a summary proceeding the rights of the petitioner in or to said funds or said lands. (1) If the petitioner were here seeking a reversal of the judgment on the merits, and asserting the adverse right to receive all or a portion of the funds in the hands of the court in the proceeding which was instituted therein, her remedy would clearly be by appeal. For wherever in a proceeding such as this, a third person intervenes in the bankruptcy court and asserts an independent and superior title to the property held by the trustee, claiming the right to recover and remove the same from the jurisdiction of the bankruptcy court as part of the estate to be administered, he institutes a controversy in a bankruptcy proceeding, whether he intervenes by an original petition, or is brought into court upon the application of the trustee, and to review the judgment of that court his remedy is by an appeal under the provisions of section 24b. . . . [Cases cited.] . . .

"But where it is sought, as in this case, to present to the Circuit Court of Appeals the question whether the District Court erroneously exercised jurisdiction to determine the merits of an adverse claim to property, the question of law so raised is a question of a bankruptcy proceeding, and it is reviewable by a petition to revise under section 24b of the Bankruptcy Act. Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; Louisville Trust Co. v. Comingor, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413; Schweer v. Brown, 195 U. S. 171, 25 Sup. Ct. 15, 49 L. Ed. 144; First Nat. Bank v. Title & Trust Co., 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051; In re Gill, 190 Fed. 726, 111 C. C. A. 454; In re McMahon, 147 Fed. 684-687, 77 C. C. A. 668; In re Blum, 202 Fed. 883, 121 C. C. A. 241; Shea v. Lewis, 206 Fed. 877, 124

C. C. A. 537; In re Goldstein, 216 Fed. 887, 133 C. C. A. 91."

Shea v. *Lewis:*

"The errors mainly relied upon as stated in the brief are: First, that the referee was without jurisdiction in summary proceedings to try the right and title of claimant Abbie A. Shea to the real and personal property she is ordered to turn over to the trustee . . .

"(1) Out of abundance of caution appellants and petitioners present this case on appeal and by petition to revise. In the view we take, it is unnecessary to determine whether appeal will lie. It is conclusively established that where, in a case like this, the District Court erroneously retains jurisdiction to adjudicate the merits, its action can be corrected on review."

To the petitioner's argument that "when the decree complained of is in relation to a plenary suit the exclusive remedy is by appeal under section 24a even though the only question before the Circuit Court of Appeals is a question of law" the opinion of Judge DODGE presents the complete answer, "That a result on the merits, had there been jurisdiction, could have been reviewed here only on appeal, does not prove that we are without power to determine the question of jurisdiction under such a petition as this."

In re Weidhorn, 253 Fed. 28, 29 (C.C.A. 1).

An instance where a petition to review was entertained in the Circuit Court of Appeals to determine the correctness of a decision of a District Court as to the extent of the jurisdiction of a Referee similar to the present is—

In re Gill, 190 Fed. 726 (C.C.A. 8).

II.

A COURT OF BANKRUPTCY HAS JURISDICTION OVER SUITS SUCH AS THE PRESENT ONE BROUGHT BY A TRUSTEE IN BANKRUPTCY.

The suit at bar, brought to recover property fraudulently conveyed by the bankrupt, may properly be brought by the trustee in bankruptcy in a Court of Bankruptcy.

> Bankruptcy Act, § 70*e* (Comp. St. 1916, § 9654*e*).

The issue therefore narrows down to the question whether this suit brought before the Referee was brought in a Court of Bankruptcy. It involves an examination of the standing, status, and functions of a Referee under the provisions of the Bankruptcy Act in order properly to determine this question.

III.

THE STATUS OF A REFEREE IN BANKRUPTCY.

It has been well stated that the present Bankruptcy Act is a compromise not only of commercial interests and of methods of practice, but even of principles.

> *In re Hammond,* 98 Fed. 845 (D. Mass.).

Under the Act of 1867 the Referee in bankruptcy had only ministerial powers, while the present Act adds judicial to these ministerial powers.

> *Mueller* v. *Nugent,* 184 U.S. 1.

"An expression used in the debates in Congress

was that the referee under the new act was to be almost a judge in chambers. There is a great deal to be said in favor of extensive jurisdiction in the hands of the referees in view of their knowledge of local conditions and power to facilitate the disposition of the ever increasing bankruptcy business of the country."

Matter of Valez, 39 A.B.R. 307, 310.

The status of the Referee in bankruptcy has been often described as "clothed with the authority of a judge" or as exercising "much of the judicial authority of that [the Court of Bankruptcy] Court."

"Referees in bankruptcy are appointed by the Court of bankruptcy and take the same oath of office as judges of United States Courts. Each case in bankruptcy is referred by the Court of bankruptcy to a referee and he exercises much of the judicial authority of that Court."

White v. *Schloerb,* 178 U.S. 542, 546.

"We think the referee has the power to act in the first instance in matters such as this when the case has been referred and in aid of the court of bankruptcy, and exercises in such case 'much of the judicial authority of that court'. White vs. Schloerb, 178 U.S., 542. By a petition for review the matter can be carried to the bankruptcy court and the entire record and findings laid before that tribunal, as was done here."

Mueller v. *Nugent,* 184 U.S. 1.

"Referees in their hearing within the scope of their powers are clothed with the authority of judges."

In re McIntyre, 142 Fed. 593.

"But the bankrupt proceedings, after adjudica-

tion, had been referred to this referee, who had, therefore 'much of the judicial authority of the court.' "

Hinds v. *Moore*, 134 Fed. 221, 224 (C.C.A. 6) (LURTON, J.).

It may fairly be said that the Act contemplates that the referee and judge shall have equal powers as a Court of Bankruptcy except where the Act expressly limits any specified function to the judge alone.

" 'Courts' shall mean the Court of Bankruptcy in which the proceedings are pending and may include the referee."

Bankruptcy Act, § 1 (7) (Comp. St. 1916, § 9585 (7)).

"Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to . . . (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this Act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided. . . ."

Bankruptcy Act, § 38 (Comp. St. 1916, § 9622).

Referees are required to take the same oath of office as that prescribed for judges of United States Courts.

Bankruptcy Act, § 36 (Comp. St. 1916, § 9620).

"The records of all proceedings in each case before a referee shall be kept as nearly as may be in the same manner as records are now kept in

equity cases in circuit courts of the United States."

Bankruptcy Act, § 42*a* (Comp. St. 1916, § 9626 (A)).

Carrying out this underlying idea of the judicial functions of the Referee, the Supreme Court in the General Orders provides:

"All process, summons and subpoenas shall issue out of the court, under the seal thereof, and be attested by the Clerk; and blanks, with the signature of the clerk and seal of the court may, upon application, be furnished to the referees."

General Order III.

"1. The order referring a case to a referee shall name a day upon which the bankrupt shall attend before the referee; and from that day the bankrupt shall be subject to the orders of the court in all matters relating to his bankruptcy, and may receive from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court. A copy of the order shall forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. And thereafter *all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee.*"

"3. Applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States or of a State, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the Referee to ascertain and report the facts."

General Order XII.

In other connections it is obvious that the Referee is the official meant when the Court is mentioned.

> "Upon application to the Court . . . the trustee may be authorized to sell . . . the bankrupt estate at private sale . . ."
>
> General Order XVIII (2).

> "Upon petition by a bankrupt, creditor, receiver or trustee setting forth that a part or the whole of the bankrupt's estate is perishable . . . the Court if satisfied of the facts stated . . . may order the same to be sold . . ."
>
> General Order XVIII (3).

Forms 42, 43, 44, 45, and 46, as well as the uniform practice in all jurisdictions, recognize that the Court in this instance is the Referee.

Section 2 (3) (Comp. St. 1916, § 9586 (3)) and section 44 (Comp. St. 1916, § 9628) provide that the Courts of Bankruptcy may appoint receivers and, the creditors failing to choose, may appoint trustees. In the first instance the Referee in some cases acts as the Court, and in the latter always.

Compare also § 64 (A) (Comp. St. 1916, § 9648 (A)):

> "It is conceded that the term 'court' as used in this paragraph included the Referee."
>
> *In re Tilden,* 91 Fed. 500.

In the absence of the Judge from the District Court the Referee may be called upon to discharge his judicial functions.

> "Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition. If the judge is ab-

sent from the district, or the division of the district in which the petition is filed at the time of the filing, the clerk shall forthwith refer the case to the referee."

Bankruptcy Act, § 18 (*g*) (Comp. St. 1916, § 9602 (G)).

It is fairly said: "Again where the Bankruptcy Court has jurisdiction, the referee has also jurisdiction except when the case is referred to him for a special purpose, or where the bankrupt asks to be adjudged a bankrupt or seeks a discharge from bankruptcy."

In re Brenner, 190 Fed. 209, 211 (M.D. Pa.).

This idea of the co-extensive jurisdiction of Referee and judge, except where otherwise expressly specified in the statute, finds expression in Judge SANBORN's words:

"Moreover, if the District Court had jurisdiction to require the mortgagee, by a notice or order to show cause, to present its claim before it, or be barred of any lien upon, or right to share in, the proceeds of the property in its possession, the referee had like power in this particular instance; for neither the Bankruptcy Act nor the General Orders in Bankruptcy require such a proceeding to be had before the judge or the Court."

In re Rochford, 124 Fed. 182, 184 (C.C.A. 8).

The Circuit Court of Appeals for the Second Circuit has pointed out that the Referee is constituted the Court of Bankruptcy for all purposes when a case is once generally referred to him, except in the specific instances expressly excepted by the Act or the General Orders.

"The proceedings required by the act to be

had before the judge are applications for discharge, for approval of compositions, for punishment for contempt, contested involuntary petitions in bankruptcy, and all petitions for adjudication when the judge is in the district. The proceedings other than these required by the general orders to be had before the judge are applications for injunctions to stay proceedings of a court or officer of the United States or of a state, and for the removal of a trustee.

"No question is made but that this case had been referred generally to the referee, as provided in section 22 of the act (30 Stat. 552 (U.S. Comp. St. 1901, p. 3431)). The referee, therefore, constituted a court, with all the powers of the court, for the purposes of this examination."

In re Abbey Press, 134 Fed. 57 (C.C.A. 2).

IV.

THE REFEREE HAD JURISDICTION TO ENTERTAIN THESE PROCEEDINGS.

Nothing, either in the Act or in the General Orders, expressly requires a proceeding upon a bill in equity to recover property claimed by a trustee in bankruptcy whereof "any court of bankruptcy" has jurisdiction under section 70(E) (Comp. St. 1916, § 9654) to be had before the Judge.

Under section 22*a* of the Bankruptcy Act (Comp. St. 1916, § 9606) the District Judge may refer a case "generally to the referee or specially with only limited authority to act in the premises or to consider and report upon specified issues." There is no suggestion in the case at bar but that the reference to the Referee was general, and that in the absence of any restrictive rule or order of the District Court the Ref-

eree, by virtue of the general order of reference, acquired all the jurisdiction that any Referee could acquire under section 38 of the Bankruptcy Act (Comp. St. 1916, § 9624).

The proceedings in this case before the Referee in bankruptcy were not summary, but plenary. They were begun by the filing of a bill in equity, the issuing of a subpœna out of the office of the Clerk of the District Court returnable on a day fixed, and an opportunity to the respondents to file pleadings and be heard upon the matters at issue was given and accepted.

The decision of the Court of Appeals which is now under review is the only one on the subject by any Court of final authority. Other than the decision of the District Court, which was reversed, such citations as are to be found, we submit, with a single exception, and that an opinion of a Referee of North Dakota (*In re Overholzer*, 23 A.B.R. 10), are to the effect that the Referee has jurisdiction to entertain such proceedings as the present.

In re Steuer, 104 Fed. 976.
In re Ballou, 33 A.B.R. 21.
In re Shults & Marks, 11 A.B.R. 690.
In re O'Brien, 21 A.B.R. 11.
In re Scherber, 131 Fed. 121.

Cases such as *In re Carlile*, 199 Fed. 612, cited on our opponent's brief, deal with the jurisdiction of a Referee in summary proceedings over rights and title adversely claimed by third persons, and is beside the point.

In re Shults & Marks, 11 A.B.R. 690.

While reference is made in the opinion to a standing rule of the local District Court, that rule is in effect no more than an order for a general reference of a case to a Referee, such as is used in the practice in Massachusetts, followed in our case. We submit that Judge MORTON, who attempted to distinguish this case in his opinion in the District Court, was in error in thinking that a special rule was the deciding factor in this decision. Especially is this so as no rule of Court can confer jurisdiction where otherwise none exists.

In re O'Brien, 21 A.B.R. 11.

While at one stage of the case there was a consent to proceeding before the Referee, later new pleadings were filed, to which the consent did not apply, and the proceedings in question were *in invitum*. Judge MORTON, who also sought to distinguish this case, has lost sight of this in assuming that the case was one of "jurisdiction by consent."

The Circuit Court of Appeals, however, did not base its decision merely on following express precedents, but decided in favor of the jurisdiction of the Referee on what we respectfully submit is a logical construction of section 38 (4) (Comp. St. 1916, § 9622). It held that "an intent on the part of Congress may reasonably be inferred to permit the exercise of all functions of the bankruptcy courts not specifically excepted, by a number of local officers of the court, easily accessible throughout each district, instead of empowering the District Judge alone to exercise them, at the statutory places for holding his court."

V.

THE PRACTICE OF YEARS HAS RECOGNIZED THE EXISTENCE OF THIS JURISDICTION IN A REFEREE.

In the many years of practice under the present Bankruptcy Act, without express decisions, the profession has come to recognize a Referee in bankruptcy as having jurisdiction to entertain suits such as the present. Perhaps this of itself is not a conclusive argument, but when over many years and in different parts of the country this has come to be accepted as a proper interpretation of the Act, any Court should give great weight to that fact and its far-reaching effect. While we have not attempted any exhaustive collection of cases of this character, cases are numerous where such jurisdiction has in fact been exercised by Referees. Such cases as the present have been decided by Referees and their decisions reviewed not only by District Courts, but also by Circuit Courts of Appeal and by the United States Supreme Court, without any suggestion that the Referee's action in entertaining such suits and giving a decision was beyond his jurisdiction. It is well recognized that the rule—

> "is inflexible and without exception which requires this Court [the Supreme Court of the United States] of its own motion, to deny its own jurisdiction and, in the exercise of its appellate power, that of all other Courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental

question is that of jurisdiction, first of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested and without respect to the relation of the parties to it."

Mansfield, C. & L.M.R. Co. v. *Swan,* 111 U.S. 379, 382.

It is equally the duty of all other Federal Courts *sua sponte* to pass upon the question of jurisdiction in each case presented.

Hutchinson v. *American Palace Car Co.,* 104 Fed. 182 (D.C. Me.):

Thus, "A question of jurisdiction is fundamental and underlies all other questions arising in the course of a litigation. Such a question may be raised at any time, in any mode, and at any stage, as every step taken in the progress of a cause is an assertion of jurisdiction, and the court may, of its own motion, make the objection or institute such investigation as may be necessary to establish or defeat it. This is especially true of the federal courts, as being courts of limited or statutory jurisdiction."

Kreider v. *Cole,* 149 Fed. 647, 649 (C.C.A. 3):

These instances of the exercise of jurisdiction by a Referee which have been passed upon by higher Courts, have therefore more significance than merely cases which have slipped by without notice.

Studley v. *Boylston National Bank,* 229 U.S. 523:

A proceeding was instituted before a Referee to recover an alleged preference. Referee found for

defendant. Before the Circuit Court of Appeals the Referee's judgment was affirmed, 200 Fed. 249. In the Supreme Court the opinion calls attention to the fact that "the case was tried by the Referee, who sustained the bank's claim of set-off, holding that the payments were not transfers." No point is raised as to jurisdiction.

Clark v. *Rogers*, 228 U.S. 534:

This case was a proceeding to recover a preference brought before a referee. In the opinion of Judge DODGE, printed on page 10 of the record presented before the Circuit Court of Appeals for the First Circuit, it is stated that a motion to dismiss for want of jurisdiction was originally filed by the respondent before the referee, but when the case came before the District Court it was stated that the respondent was willing that the Court should proceed with the case if the Court was of opinion that it lawfully could. The Court gave judgment in favor of the trustee. On appeal to the Circuit Court of Appeals this judgment was affirmed without reference to the question of jurisdiction (183 Fed. 518). The Supreme Court affirmed the decree without adverting to the question of jurisdiction.

In re States Printing Co., 238 Fed. 775 (C.C.A. 7):

Trustee in bankruptcy brought suit before a referee to set aside an alleged preference. Judgment for defendant. On review before the District Court, the judgment was reversed. The Circuit Court of Appeals affirmed the judgment of the District Court.

In re Kearney, 167 Fed. 995 (E.D. Pa.):

Proceedings before a referee to recover a preference. Judgment for plaintiff affirmed by District Court.

In re Starkweather & Albert, 206 Fed. 797 (W.D. Mo.):

Proceedings before a referee to set aside alleged preferential conveyance. Judgment for plaintiff affirmed by District Court.

In re Hoffman, 199 Fed. 448 (D. N.J.):

Petition filed before referee to obtain return of bonds transferred to defendant. Certain evidence being rejected at the hearing on review, the district judge held that it should have been admitted, reversed the judgment, and remanded the proceedings to the referee with instructions to receive the testimony.

Peninsula Bank v. *Wolcott*, 232 Fed. 68 (C.C.A. 4):

In this case the trustees of the bankrupt instituted a proceeding before the referee to set aside as a preference a trust deed given to secure indebtedness of the bankrupt. The referee reported the deed of trust invalid as an illegal preference. Upon petition for review his finding was affirmed by the District Court. The Court of Appeals entered an order modifying the decree of the District Court, holding the deed of trust valid as a security for some of the notes, and invalid as to one note.

In re Berry, 247 Fed. 700 (E.D. Mich.):

In this suit plenary proceedings were begun by the trustee before a referee against a third person for the recovery of property alleged to belong to the bankrupt estate. The referee denied the petition. On review before the District Court petition denied. The Court ruled that there was jurisdiction in the referee to entertain such plenary proceedings in this case on the ground that there

had been a waiver of objection to jurisdiction of the Court.

VI.

TO HOLD THAT THE REFEREE HAS SUCH JURISDICTION IS DESIRABLE.

(A)

It offers an opportunity to try issues which are usually closely related to the ordinary bankruptcy proceedings before a magistrate who is peculiarly fitted to deal intelligently with such cases from the experience and familiarity which a Referee in bankruptcy must gather from his regular official duties. The kind of questions which are here in litigation are constantly being heard and dealt with by Referees in bankruptcy. When a creditor presents a claim for allowance, on objection that the claim ought not to be allowed because he has received a preference, a Referee hears the very issue involved in the present suit. If the Referee decides that such a preference has been given, it is *res judicata* in subsequent litigation to recover back the property given as the preference.

Lincoln v. *Peoples Nat. Bank*, 260 Fed. 422.

If the property had been in the trustee's custody when the controversy arose over a claim to it presented by a creditor, or if a lien was claimed thereon, the Referee has undoubted jurisdiction to try the issues, although it involves the very kind of law ques-

tions and evidence of the same character that are involved in the present case.

Hewitt v. *Berlin Machine Works*, 194 U.S. 296.
York Mfg. Co. v. *Cassell*, 201 U.S. 344.
Nisbet v. *Federal Title & Trust Co.*, 229 Fed. 644 (C.C.A. 8).
Wuerpel v. *Commercial Bank*, 238 Fed. 269 (C.C.A. 8).
Dunlap v. *Baker*, 239 Fed. 193 (C.C.A. 4).
Galbraith v. *Robson-Hilliard Grocery Co.*, 216 Fed. 842 (C.C.A. 8).

In view of this, Judge Morton's criticism that to allow the Referee to hear such controversies as the present "would amount to a peculiar delegation of the general equity powers of the Court, the exact limitation of which, territorial or otherwise, it is not easy to understand" seems to have failed to take into consideration that this objection is one merely to the jurisdiction of the Referee, due to the form in which the question is presented, inasmuch as the Referee has unchallenged general equity powers to dispose of this very line of litigation if raised when property concerned in the litigation is in the custody of the Bankruptcy Court.

Again, there are also cases where a Referee deals with just such issues as these in summary proceedings. After ascertaining that the defendant has an adverse claim, but raises no question as to jurisdiction of the Referee (*i.e.*, consents either directly or indirectly to the case proceeding before the Referee), the litigation continues on the merits, a judgment is entered by the Referee and on appeal the Courts

deal with the matter on the assumption that the Referee has jurisdiction and power after hearing to render a judgment (Bankruptcy Act, § 63*b;* Comp. St. 1916, § 9647).

In re Carlile, 29 A.B.R. 373.
Fairbanks Shovel Co. v. *Wills,* 240 U.S. 642.
Chauncey v. *Dyke Bros.,* 119 Fed. 1 (C.C.A. 8).
In re Connolly, 100 Fed. 620 (E.D. Pa.).

(B)

It offers a local forum before which such trials may be had without necessitating parties in some of the districts going far from home, dragging their witnesses with them to the statutory place where the District Judge sits, and thus saves both time and expenses for litigants.

> "The object of this provision (Section 38 (4)) was to bring the Courts of Bankruptcy home to the local attorneys, throughout the various districts, and to relieve them and litigants, both debtors and creditors, from travelling long distances to attend Federal Courts. In other words, Congress intended to remove the objections which have always been raised of late against the passage of a bankruptcy act by putting a court of bankruptcy into each county."
>
> *In re Murphy,* 3 A.B.R. 499, 507.

(C)

In busy districts like Massachusetts and New York it affords a speedier trial for these cases than can be had before District Judges, already overworked, when such cases must be sandwiched in with naturalization,

criminal trials, admiralty, bankruptcy, patent hearings, ordinary civil jury trials, and other equity proceedings.

(D)

If in any district it is deemed desirable for one reason or another to cut down the jurisdiction of Referees, either in a particular case or in a given class of cases, as was pointed out in the opinion in the Circuit Court of Appeals (253 Fed. 31), it is always in the judge's power to cut down the jurisdiction of a Referee by limiting the power given him in the order of reference.

Moreover, as Judge LOWELL says in the Steuer case (104 Fed. at 980):

> "It is pertinent to inquire what would be the practical result if original jurisdiction in proceedings like these were held to reside in the judge alone. The judge, being too heavily burdened to hear the evidence, would refer the petition to the referee under General Order XII, subd. 3, or by the analogy of that order. The referee would hear the evidence, and report it to the judge, with his conclusions thereupon. Such a proceeding, while quite different in form from that to be followed if the referee has original jurisdiction, yet does not greatly differ from the latter proceeding in practical result."

In the present case Judge DODGE, speaking for the Circuit Court of Appeals, makes practically the same suggestion (253 Fed., at 31):

> "Such a construction of the above provisions of the act involves no substantial prejudice to any right of a defendant against whom such a bill

is brought. If it were addressed to the judge, instead of the referee, filed, not with the referee, but in the clerk's office, and heard by the referee under directions from the court to ascertain the facts and report thereon, no one would doubt that the 'duties conferred upon the bankruptcy court' in the case had been so far properly performed. The referee's report, with the evidence before him, if necessary, would then come before the District Judge for confirmation or disaffirmance, and the final decree of the court accordingly would follow. If heard and decided by the referee, as in this case, a petition for review would also bring the whole matter, with the evidence heard, before the judge, whose order affirming or disaffirming that made by the referee would also amount to a final decree by the District Court. We see no difference between the two methods of reaching a final result in the District Court sufficiently important to require the conclusion that the latter method cannot be one contemplated by the act."

VII.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN LINE WITH ENLIGHTENED EQUITY PROCEDURE.

It is of course fundamental that the whole theory and practice of bankruptcy is modeled on and developed from chancery principles and practice. The Referee in bankruptcy, after the case is referred to him, occupies the same relation to the case that a District Judge does to a receivership proceeding in which he sits after the appointment of a receiver. More and more the courts of equity have recognized that it makes for a better and more efficient adminis-

tration of receiverships in courts of equity if the Judge sitting in the main proceedings can pass upon the collateral and incidental litigation that is bound to arise without remitting parties to other jurisdictions or other tribunals to try out conflicting rights. Therefore, if just such issues and litigation as exist in preference cases were to arise in a United States receivership proceeding, the sitting District Judge would entertain a petition by the receiver and order the parties to appear before him and try out their rights in the receivership proceedings.

White v. *Ewing*, 159 U.S. 36.
Hume v. *Boston*, 255 Fed. 439.
Hollander v. *Heaslip*, 222 Fed. 808.
Cunningham v. *Cleveland*, 98 Fed. 657.
Peck v. *Eliott*, 79 Fed. 10.

VIII.

OBJECTIONS ANSWERED.

It is hinted in the petitioner's brief that this jurisdiction of the Referee should not be recognized because "the referee's Court is without adequate contempt powers to insure orderly trials, has no power to call for the assistance of a jury, etc." (p. 10). In the first place we take issue with the expression "referee's court." The Referee has no court. The Referee is merely an official functioning in the District Court sitting as a Court of Bankruptcy. But passing this, let us analyze the two alleged defects:

(A)

Contempt.

It is true that the Referee is by express statutory limitations (Bankruptcy Act, § 41; Comp. St. 1916, § 9625) enjoined from personally punishing for a contempt, but under this section he is part of the machinery which, once put in operation, results in a proper penalty being inflicted for a contempt. One would not say that a judge had his power to try cases taken away because newer ideas expressed in recent legislation prescribe a trial by jury in certain contempt proceedings instead of leaving the issue wholly in the hands of the trial Judge.

So, in the solution of our present problem, the fact of the ability or inability of the Referee exclusively to inflict the punishment for a contempt neither adds nor subtracts anything. It is beside the point.

(B)

Jury Trial.

Although the authorities are not unanimous, it seems well settled by the weight of decisions that a bill in equity, while not an exclusive remedy, is at least a proper one to recover a preference.

Parker v. *Sherman*, 212 Fed. 917 (C.C.A. 2).
Off v. *Hakes*, 142 Fed. 363 (C.C.A. 7).
Paid v. *N.Y. Nat. Ex. Bank*, 124 Fed. 992, 993.
Parker v. *Black*, 143 Fed. 560; 151 Fed. 18 (C.C.A. 2).
Grandison v. *Nat. Bank*, 220 Fed. 981.
Johnson v. *Hanley Hoye Co.*, 188 Fed. 752.

Other instances where a trustee maintained a bill in equity to recover money and payment preferences are—

Bush v. *Moore,* 133 Mass. 198.
Baxton v. *Ord,* 239 Fed. 503 (C.C.A. 6).
Page v. *Rogers,* 211 U.S. 575.
Van Iderstine v. *Nat. Discount Co.,* 237 U.S. 575, 581.
Getts v. *Janesville Wholesale Grocery Co.,* 163 Fed. 417.
Clarke v. *Rogers,* 228 U.S. 534.
Studley v. *Boylston Bank,* 229 U.S. 523.
In re Plant, 148 Fed. 37.
Contra: Simpson v. *Western Hardware & Metal Co.,* 227 Fed. 304.

If a jury trial in an equity suit is deemed desirable, either the Referee can frame issues and arrange with the District Judge for a jury trial as would be done in other chancery proceedings in the District Court—

In re Rude, 101 Fed. 805

or it has been suggested that a jury can be had, if necessary, upon appeal.

In re Murphy, 3 A.B.R. 499, 507.

But in the argument based on the failure to provide an opportunity for a jury trial in this class of cases sight is lost of the fact that the litigants have not as of right a trial by jury "in case of equity, and of admiralty and maritime jurisdiction—proceedings in bankruptcy" (Comp. St. 1916, §§ 1583, 1584) (Bankruptcy Act, § 19 (C); Comp. St. 1916, § 9603 (C)).

The constitutional guaranty of a right to trial by jury has no reference to equity cases.

Luria v. *United States*, 231 U.S. 9, 27.
Barton v. *Barbour*, 104 U.S. 126, 133.
Wood v. *Henderson*, 210 U.S. 246, 258.
Shields v. *Thomas*, 18 How. 253, 262.

> "Due process of law does not require a plenary suit and a trial by jury in all cases where property or personal rights are involved." "And the courts of chancery, *bankruptcy*, probate and admiralty administer immense fields of jurisdiction without trial by jury."

Ex Parte Wall, 107 U.S. 265, 289.

(C)

It is suggested that the General Order XII (1) contemplates that a Referee shall have no jurisdiction to act in matters other than those which come within the term "proceedings in bankruptcy."

General Orders XII (2) provides that after a general reference such as existed in the present case "the referees may perform the duties which they are empowered by the Act to perform." It seems too plain for argument that the Referees are called on to perform many duties which do not relate to "proceedings in bankruptcy," as distinguished from controversies arising in bankruptcy, and that to limit General Order XII (2) by this restrictive definition of General Order XII (1) is to place an unnecessary hampering narrowness on the words and to create a direct conflict between two sections of the same General Order.

IX.

CONCLUSION.

We submit in the first place that this question was properly presented before the Circuit Court of Appeals in the present proceedings;

Secondly, that, not only under the decisions and in accordance with the long-settled practice in Federal Courts, but also under the correct and logical interpretation of the Bankruptcy Act, the Referee in bankruptcy had jurisdiction to entertain the present action and that the Circuit Court of Appeals for the First Circuit was correct in reversing the District Court;

Wherefore we ask that this Court sustain the action of the Circuit Court of Appeals.

LEE M. FRIEDMAN,
FRIEDMAN & ATHERTON,
Attorneys for Respondent.

WEIDHORN *v.* LEVY, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF WEIDHORN, BANKRUPT.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 203. Argued January 28, 29, 1920.—Decided June 1, 1920.

A referee in bankruptcy is not a separate court, nor endowed with any independent judicial authority, but merely an officer of the court of bankruptcy having no power except as conferred by the order of reference, read in the light of the act, and whose judicial functions are subject always to the review of the bankruptcy court. P. 271.

Under the Bankruptcy Act and the general orders in bankruptcy, a referee, by virtue of a general reference under Order XII (1), has not jurisdiction over a plenary suit in equity brought by the trustee in bankruptcy against a third party to set aside a fraudulent transfer or conveyance under § 70e, and affecting property not in the custody or control of the court of bankruptcy. Pp. 270–274.

A decree of the District Court, vacating a decree made by the referee in such a suit and dismissing the bill, upon the ground that the referee exceeded his powers under the order of reference, is reviewable in the Circuit Court of Appeals by petition to revise under § 24b of the act. P. 269.

253 Fed. Rep. 28, reversed.

THE case is stated in the opinion.

Mr. William M. Blatt, with whom *Mr. Walter Hartstone* was on the brief, for petitioner.

Mr. Lee M. Friedman for respondent.

MR. JUSTICE PITNEY delivered the opinion of the court.

Upon his voluntary petition, filed in February, 1916, J. Herbert Weidhorn was adjudged a bankrupt, and the

District Court referred the case to a referee under General Order XII (1). Thereafter the trustee in bankruptcy addressed to and filed with the referee a bill in equity against the bankrupt's brother, Leo Weidhorn (the present petitioner) and the Boston Storage Warehouse Company, alleging that certain chattel mortgages, or bills of sale in the nature of mortgages, made by the bankrupt to Leo more than four months before the filing of the petition in bankruptcy, and under which, prior to the filing of the petition, possession of the chattels had passed to the mortgagee and the Storage Warehouse Company, were invalid because made in fraud of creditors, and seeking to set them aside under the Statute of Elizabeth and the Bankruptcy Act, § 70e, and recover the chattels or the proceeds thereof for the bankrupt estate. Defendant Leo Weidhorn promptly objected to the jurisdiction of the referee, and afterwards answered to the merits. The referee overruled the jurisdictional objection, proceeded to hear the merits, and entered a final decree in favor of the trustee. On review the District Court, considering the jurisdictional question only, vacated the decree and dismissed the bill upon the ground that the referee exceeded his powers under the order of reference. 243 Fed. Rep. 756. The trustee petitioned the Circuit Court of Appeals to revise the decree under § 24b; and that court, deeming that the District Court had erred in holding that the referee acted without jurisdiction, reversed its decree dismissing the bill and remanded the cause for further proceedings, including a review of the merits. 253 Fed. Rep. 28. A writ of certiorari brings the case here.

It is assigned for error that the Circuit Court of Appeals ought not to have entertained the petition to revise under § 24b; the contention being that since the decree complained of was made in a plenary suit the exclusive remedy was by appeal under § 24a. Had the District Court sustained the jurisdiction and passed upon the merits the

point would be well taken, as the court thereby would have determined a "controversy arising in bankruptcy proceedings." *Hewit* v. *Berlin Machine Works*, 194 U. S. 296, 300. But since the decision turned upon a mere question of law as to whether the referee had authority to hear and determine the controversy—in effect a question of procedure—it properly was reviewable by petition to revise under § 24b. *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, 26; *Schweer* v. *Brown*, 195 U. S. 171, 172; *First National Bank* v. *Chicago Title & Trust Co.*, 198 U. S. 280, 288, 291; *Matter of Loving*, 224 U. S. 183, 188; *Gibbons* v. *Goldsmith*, 222 Fed. Rep. 826, 828.

Did the referee exceed the authority and jurisdiction conferred upon him by the Bankruptcy Act and the general order of reference?

The following provisions of the act are pertinent: By § 1 (7) " 'court' shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee." By § 18g, "If the judge is absent from the district, or the division of the district in which the petition is filed at the time of the filing, the clerk shall forthwith refer the case to the referee." Section 22 provides that after a person has been adjudged a bankrupt the judge may make a reference to the referee either generally or specially with limited authority to act or to consider and report, and "may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another." By § 36, "Referees shall take the same oath of office as that prescribed for judges of United States courts." And by § 38a, "Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to . . . (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this Act conferred on courts of bankruptcy and

as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided."

These provisions make it clear that the referee is not in any sense a separate court, nor endowed with any independent judicial authority, and is merely an officer of the court of bankruptcy, having no power except as conferred by the order of reference—reading this, of course, in the light of the act; and that his judicial functions, however important, are subject always to the review of the bankruptcy court.

In the general orders established by this court pursuant to the act, under XII (1) provision is made for an order referring a case to a referee; "And thereafter all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee." 172 U. S. 657.

The question is, whether the present suit brought by the trustee in bankruptcy against petitioner was a "proceeding" within the meaning of this provision. We cannot concur in the view of the District Court that this question is governed by the distinction between "proceedings in bankruptcy" and "controversies at law and in equity arising in bankruptcy proceedings," as these terms are employed in §§ 23, 24a, 24b, and 25a; there may be controversies arising in the course of bankruptcy proceedings that are so far connected with those proceedings as to be in effect a part of them and capable of summary disposition by the referee under the general order of reference, although because of their nature or because involving a distinct and separable issue they may be reviewable, under the sections cited, by appeal rather than by petition to revise. *Hewit* v. *Berlin Machine Works*, 194 U. S. 296, 300; *Knapp* v. *Milwaukee Trust Co.*, 216 U. S. 545, 553.

Thus, if the property were in the custody of the bankruptcy court or its officer, any controversy raised by an

adverse claimant setting up a title to or lien upon it might be determined on summary proceedings in the bankruptcy court, and would fall within the jurisdiction of the referee. *White* v. *Schloerb*, 178 U. S. 542, 546; *Mueller* v. *Nugent*, 184 U. S. 1, 13.

But in the present instance the controversy related to property not in the possession or control of the court or of the bankrupt or anyone representing him at the time of petition filed, and not in the court's custody at the time of the controversy, but in the actual possession of the bankrupt's brother under an adverse claim of ownership based upon conveyances made more than four months before the institution of the proceedings in bankruptcy. In order to set aside these conveyances and subject the property to the administration of the court of bankruptcy a plenary suit was necessary (*Babbitt* v. *Dutcher*, 216 U. S. 102, 113), and such was the nature of the one that was instituted.

Under the Bankruptcy Act of 1898 as originally passed, an independent suit of this character could not be brought in the District Court in bankruptcy "unless by consent of the proposed defendant." Act of July 1, 1898, c. 541, § 23b, 30 Stat. 544, 552; *Bardes* v. *Hawarden Bank*, 178 U. S. 524. Whether under the Act of February 5, 1903, c. 487, 32 Stat. 797, 798, 800, amending §§ 23b and 70e, a suit for the recovery of property fraudulently transferred by the bankrupt could be brought in a court of bankruptcy without the consent of defendant was a question left undetermined in *Harris* v. *First National Bank*, 216 U. S. 382, 385, but answered in the negative in *Wood* v. *Wilbert's Sons Co.*, 226 U. S. 384, 389. By Act of June 25, 1910, c. 412, § 7, 36 Stat. 838, 840, § 23b was further amended so as to confer jurisdiction upon the courts of bankruptcy without consent of the proposed defendant in suits for the recovery of property under § 70e. The present suit, being of this nature, might have been brought in the District Court; or

it might have been brought in a state court having concurrent jurisdiction under § 70e as amended.

We find nothing in the provisions of the Bankruptcy Act that makes it necessary or reasonable to extend the authority and jurisdiction of the referee beyond the ordinary administrative proceedings in bankruptcy and such controversial matters as arise therein and are in effect a part thereof, or to extend the authority of the referee under the general reference so as to include jurisdiction over an independent and plenary suit such as the one under consideration. The provisions of the act, as well as the title of his office, indicate that the referee is to exercise powers not equal to or coördinate with those of the court or judge, but subordinate thereto; and he becomes "the court" only by virtue of the order of reference. In the General Orders the word "proceedings" occurs frequently, but never in a sense to include a plenary suit. On the other hand, "proceedings in equity" and "proceedings at law" are specially dealt with in General Order XXXVII.

The practice is not uniform; we have found no decision by a Circuit Court of Appeals upon the point; and the decisions of the district courts are conflicting. A referee's opinion in *In re Murphy* (1900), 3 Am. Bank. Rep. 499, 505, upholds his jurisdiction over a plenary proceeding by the trustee to set aside a preferential transfer of property to a creditor. In *In re Shults & Mark* (referee's opinion), 11 Am. Bank. Rep. 690, a special form of reference having been adopted by the district court, it was held that jurisdiction was conferred upon the referee over proceedings under § 60b to recover property preferentially transferred and under § 67e to recover property fraudulently transferred. In *In re Steuer* (D. C. Mass.), 104 Fed. Rep. 976, 980, a plenary suit to avoid a preference was heard before the referee without objection, and upon petition to review his action the district court, with some hesitation, directed that a decree issue "as if made originally by the judge, and

not simply as an affirmance of the decree of the referee." In *In re Scherber* (D. C. Mass.), 131 Fed. Rep. 121, 124, it was found unnecessary to determine whether the referee could proceed over objection to take jurisdiction of a plenary suit to recover a preference. Views adverse to the jurisdiction of the referee in an independent proceeding to avoid a transfer were expressed in *In re Walsh Brothers* (D. C. Ia.), 163 Fed. Rep. 352; *In re Carlile* (D. C. N. Car.), 199 Fed. Rep. 612, 615–616; *In re Ballou* (D. C. Ky.), 215 Fed. Rep. 810, 813, 814; and *In re Overholzer* (referee's opinion), 23 Am. Bank. Rep. 10.

The point appears to have been overlooked in *Studley* v. *Boylston National Bank*, 200 Fed. Rep. 249; 229 U. S. 523, 525, 526. Other cases cited throw no useful light upon the question.

Reviewing the entire matter, we conclude that under the language of the Bankruptcy Act and of the general orders in bankruptcy a referee, by virtue of a general reference under Order XII (1), has not jurisdiction over a plenary suit in equity brought by the trustee in bankruptcy against a third party to set aside a fraudulent transfer or conveyance under § 70e, and affecting property not in the custody or control of the court of bankruptcy.

Decree of the Circuit Court of Appeals reversed, and decree of the District Court affirmed.